IN THE

# Supreme Court of the United States

October Term, 1965

No. ~~1965~~ 105

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD and GEORGE E. STARBUCK,

*Appellants,*

VS.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

*Appellees.*

ON DIRECT APPEAL FROM THE FINAL JUDGMENT OF A THREE JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF NEW YORK

## APPELLANT'S STATEMENT AS TO JURISDICTION

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Cases Cited:

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## APPELLANT'S STATEMENT AS TO JURISDICTION

Appellants' appeal from the final judgment of the United States District Court for the Western District of New York entered on the 5th day of January, 1966, holding that Section 105 of the New York State Civil Service Law, Sections 3021 and 3022 of the New York State Education Law, and

Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York, and the Administrative Regulations and Procedures used thereunder are constitutional, and appellants submit this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

## Opinions Below

The unanimous opinion of the United States District Court for the Western District of New York was rendered on January 5, 1966, is not yet officially reported and is set out in the Appendix, *infra*, at pages 48-70. The opinions of the Circuit Court of Appeals, reported in 345 F. 2d 236 (2d Cir., 1965) and the District Court, reported in 233 F. Supp. 752 (W. D. N. Y., 1964), are set out in the Appendix, *infra*, at pages 53, 54.

## Jurisdiction

This class action was instituted on July 8, 1964 under Section 1 of the Fourteenth Amendment to the Constitution of the United States, as that Amendment exists independently of the First Amendment and as that Amendment incorporates the First and Fifth Amendments; further, under Article 1, Section 10, Clause 1 and Article 6, Clause 2 of the Constitution of the United States, and further, under Section 1343 of Title 28 and Section 1983 of Title 42 and Sections 2281 and 2284 of Title 28 of the United States Code, to pass on the constitutionality of Sections 3021 and 3022 of the New York State Education Law, Section 105 of the New York Civil Service Law, Section 244, Article XVIII of the Rules of the Board of Regents of the State of New York, and the certificates required thereunder to enjoin the appellees, each of whom is either an official body

or officer of the State of New York, from enforcing the rules and statutes complained of.

By decision filed on January 5, 1966, the District Court gave judgment for the appellees and denied all relief requested by appellants. Notice of appeal was filed in the District Court for the Western District of New York on February 14, 1966. Jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *Baggett v. Bullitt,* 377 U. S. 360; *Shelton v. Tucker,* 364 U. S. 479; *Florida Lime and Avocado Growers, Inc. v. Jacobsen,* 362 U. S. 73. And see, *Sweezy v. New Hampshire,* 354 U. S. 234; *Speiser v. Randall,* 357 U. S. 513 and *Cramp v. Florida,* 368 U. S. 278.

## Statutes, Administrative Rules and Certificates Involved

The provisions of law involved in this case are: Section 105 of the New York State Civil Service Law, Sections 3021 and 3022 of the New York State Education Law, Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York, Sections 160 and 161 of the New York State Penal Law, and Feinberg Certificates, Forms A and B. Because of their length, the texts of these provisions and the certificates involved are set out in the Appendix to this statement, *infra,* pages 49, 50, 51, 87, 89.

## Questions Presented

1. Whether the New York statutory complex, together with the administrative regulations, rules and certificates, unconstitutionally condition public employment of teachers

and scholars at the university level in contravention of First Amendment freedoms.

2. Whether the New York statutory complex involved, together with the administrative rules, regulations, procedures and certificates, unconstitutionally deprive appellants of due process of law.

3. Whether the New York statutory complex involved, together with the administrative rules, procedures and certificates, constitute a bill of attainder.

4. Whether the statutory complex involved, together with the rules, procedures and regulations and certificates, constitute an *ex post facto* enactment.

## Statement

This suit challenges the constitutionality of Section 105 of the New York State Civil Service Law and the statutes incorporated by reference therein, Sections 3021 and 3022 of the New York Education Law, Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York (hereinafter referred to as the Regents Rules), and the certificates and procedures used under the various statutes and rules.

On March 31, 1949, the governor of the State of New York approved Chapter 360, Laws, 1949, being "an act to amend the Education Law in relation to eliminating from the public schools superintendents, teachers and employees who are members of subversive organizations", popularly known as the Feinberg Law. The law added a new section to the Education Law (Section 3022), the first subdivision of which directed the Board of Regents to adopt and enforce rules and regulations for the elimination of persons barred from employment in the public school system on

any of the grounds set forth in former Section 12-a of the Civil Service Law (now Section 105) and Section 3021 of the Education Law. The second subdivision of the section further provides that the Board of Regents shall, after inquiry, make a listing of organizations which it finds to be subversive on the various grounds set out in former Section 12-a (now 105) of the Civil Service Law and to provide that membership in such organizations is *prima facie* evidence of disqualification for employment or retention in any office or position in the public schools of the state.

On July 15, 1949, Article XVIII, Section 244 of the Rules of the Board of Regents, entitled "Subversive Activities", was adopted by the Board of Regents in pursuance to the provisions of the Feinberg Law. These Rules provide, in effect, that the school authorities shall put into effect certain procedures for the disqualification and removal of employees who violate Section 3021 of the Education Law or former Section 12-a (now 105) of the Civil Service Law. In essence, the Rules provide that prior to appointment of any employee, the nominating official shall inquire of his former employers and others whether he is known to have violated the statutory provisions involved and no persons found to have violated the said statutory provisions shall be eligible for employment. Each year the school authorities shall prepare a report on each employee, stating whether there is any evidence, including membership, in an organization listed as subversive by the Board of Regents, or any evidence indicating that the employee has violated the statutes involved. If there is found to be such evidence, the reporting official shall recommend the employee's dismissal and within ninety days thereafter, the school authorities must either prefer formal charges or reject the recommendation. In cases where the school authorities find that in their judgment the evidence indicates a violation of

the statutory provisions, they shall immediately commence dismissal proceedings.

In 1953, by virtue of an extremely significant amendment to Section 3022 of the Education Law (New York Laws, 1953, Ch. 681), the applicability of the entire complex of laws was extended to include not only the public schools, but institutions of higher learning, including hundreds of educators in the State University system as well. In retrospect, it can be observed that this amendment set the stage for the present suit. In September 1953, pursuant to Section 3022, the Regents listed the Communist Party of the State of New York and the Communist Party of the United States as proscribed organizations, and on May 10, 1956, an *Ad Hoc* Committee of the Board of Trustees of the State University of New York established the so-called Feinberg Certificate (see Appendix, *infra*, pages 87, 88, for original form, as well Appendix, *infra*, pages 88, 89, for modified version). The Feinberg Certificate, in essence, declares that the subscriber has read the Regents Rules, that the Regents Rules and statutes cited therein constitute the terms of his employment and that he is not now a member of the Communist Party and if he had ever been a member, he has communicated that fact to the president of the university. These certificates were apparently circulated throughout the State University system and refusal to subscribe to the certificate was made a ground for dismissal on grounds of insubordination. With respect to the certificate, it should be emphasized that it is duality. In effect, it makes inquiry into past and present associations, but even more importantly, it requires an employee or prospective employee to consent that certain offensive statutes shall form a part of his contract of employment. This aspect of the case will be further elaborated upon in the argument below.

In 1958, Section 12-a of the Civil Service Law was amended and renumbered Section 105 (New York Laws, 1958, Ch. 790). The amendment (Civil Service Law, Section 105(3)), with its references to the Penal Law, raises a question as to the effect of Sections 160 and 161 of the New York Penal Law on all the provisions here involved. Further, in 1958, a new section was added to Section 12-a (c) (New York Laws, 1958, Ch. 503), naming the Communist Party of the United States and the Communist Party of New York as proscribed organizations, thus bringing into focus the question as to whether the complex here involved is a bill of attainder.

Prior to 1962, the University of Buffalo was a private institution. However, on April 30, 1962, the University of Buffalo was merged into the State University system of the State of New York. Sometime thereafter, all members of the academic staff of the State University of New York at Buffalo were required to sign the certificate known as the Trustees Certificate (also popularly known as the Feinberg Certificate) previously alluded to as a condition of their continued employment.

Plaintiffs Keyishian, Hochfield, Garver and Maud, all under differing term appointments to the academic staff at the State University of New York at Buffalo, declined to sign the Trustees Certificate. These plaintiffs were subsequently notified that due to their failure to sign, dismissal proceedings were being undertaken against them on the grounds of insubordination. Plaintiffs were further notified that their terms would not be renewed if they did not sign the certificate as requested. The term of plaintiff Keyishian has ended and his appointment has not been renewed. The terms of two of the other three have not expired and they remain in their former positions.

They have been informed that dismissal proceedings will not be started against them until the validity of the statutes, rules, and procedures here involved is determined. Maud accepted a position after his term expired in September 1965, again subject to the determination of the present suit, but has resigned from the university. Plaintiff Starbuck was appointed by the State University of New York at Buffalo on September 1, 1963 under a one-year contract as a specialist in acquisitions, and, in addition, in January 1964 was appointed as a lecturer in English. Subsequent to the former appointment, Mr. Starbuck was required to swear to the following question:

> "Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the government of the United States or of any political subdivisions thereof should be overthrown or overturned by force, violence, or any unlawful means?"

Appellant Starbuck declined to answer this question and as a result, was dismissed from his appointment on June 18, 1964.

On July 8, 1964, appellants commenced the present class action in the United States District Court for the Western District of New York seeking an injunction against the enforcement of the statutes involved in this case and of the regulations and procedures used to implement these statutes. The District Court held that no substantial federal question was raised, and accordingly refused to refer the case to a three judge district court. 233 F. Supp. 752 (W. D. N. Y., 1964) (see Appendix, *infra*, page 53). An appeal was taken to the United States Court of Appeals for the Second Circuit which Court reversed and directed that the case be heard before a three judge court. 345 F. 2d 236 (2d Cir., 1965) (Appendix, *infra*, page 53). The Court noted that Civil Service Law, Section 105(3)

had been added since *Adler v. Board of Education*, 342 U. S. 485, and observed that there was a significant similarity between the laws in question here and those held unconstitutional in *Baggett v. Bullitt*, 377 U. S. 360. It called attention to the statement in *Weiman v. Updegraff*, 344 U. S. 183, 192, that public employment may not be denied on "patently arbitrary or unreasonable" grounds. Judge Marshall, in speaking of the *Adler* opinion, also stated that it had held Section 3022 not unconstitutional as applied to teachers in the public schools of New York, but had refused to pass upon the constitutionality of Section 3021 and had not considered the application of 3022 to university faculty.

On June 10, 1965, one week before the argument to the three judge court, the Board of Trustees of the State University of New York unanimously adopted certain resolutions (Appendix, *infra*, page 63) which in effect declared that it would no longer be State policy to require as a condition for employment, the execution of the certificates of the type referred to as A and B (Appendix, *infra*, pages 87-89). New procedures for appointments were instituted. These new procedures provide essentially that Section 105 of the New York Civil Service Law and Sections 3021 and 3022 of the New York Education Law and the Rules of the Board of Regents still constitute the terms and conditions for employment or retention in employment of any teacher or scholar. Furthermore, the resolution provide that anyone engaged prior to the effective date of the resolution shall not be deemed ineligible for employment "solely" by reason of his failure to sign the certificates involved. Thus, in addition to providing that certain offensive statutes are still part of the professors' contract terms, the resolutions maintained the constitutional issues raised by the certificates as well.

On June 16, 1965, a three judge district court, sitting in the Western District of New York, heard arguments on the merits in this case and on January 5, 1966, the same Court rendered a decision and order denying all the relief requested by the appellants (Appendix, *infra*, page 70). Thereafter, and on February 14, 1966, the appellants filed in the Federal District Court for the Western District of New York, a notice of appeal to the United States Supreme Court, thus bringing this case to its present posture.

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## ARGUMENT

### Substantial and Important Questions are presented.

**A. The question as to whether the New York statutory complex, together with the administrative regulations, rules and certificates, unconstitutionally condition public employment of teachers and scholars at the university level in contravention of First Amendment freedoms.**

This case presents the issue of freedom of speech and association in one of its most significant and sensitive aspects—the area of academic freedom. The appellants involved here, as well as hundreds of educators in the New York State University system have been required to consent that certain offensive statutes shall form a part of their employment and contract terms. A failure to so consent is made grounds for removal from university teaching positions throughout the state. Thus, the State of New York has threatened its educators with a punishment uniquely suited to mute protest and bring about doctrinal conformity. When one considers the years invested in acquiring the knowledge and skills necessary to teach at a university level with the fact of the rapid as-

similation of private universities into an ever growing public university, loss of an opportunity to teach can be seen to amount to a practical inability to follow one's profession. On a university level, a sense of freedom is crucial if the frontiers of knowledge are to be enlarged. The importance of unimpeded thought and the right of exploration for teachers, unhampered by state harrassment, far exceeds that of any other professional vocation. This Court has fully recognized the importance of this special interest.

In *Sweezy v. New Hampshire,* 354 U. S. 234, four members of the Supreme Court held the view that:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in our democracy that is played by those who guide and train our youth. To impose any straitjacket upon intellectual leaders in our colleges and universities would imperil the future of our nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few if any principles are accepted as absolute. Scholarships cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." (*Sweezy, supra,* at p. 250).

The *Sweezy* case recognizes, therefore, the vital importance of academic liberty. Its preservation is deemed fundamental to our society.

While it is clear that the Supreme Court is now committed to carefully safeguarding academic freedom, the Court has, on the other hand, never suggested that a state may not lay down reasonable terms of employment for its teachers and professors. That which constitutes

reasonableness is such a case, however, has been reexamined and modified as the importance of academic freedom has received fuller judicial recognition its opposing considerations necessarily have been forced to give away. See generally, Murphy, Academic Freedom—An Emerging Constitutional Right, 28 Law and Contemporary Problems 447 (1963).

In a series of cases, decided by a closely divided court, the Supreme Court of the United States has upheld the power of the state to inquire into an employee's associations with allegedly subversive organizations as relevant to the employee's qualifications and fitness for public employment. It has for example, upheld the discharge of municipal employees who refuse to take a statutory required disclaimer oath, *Garner v. Los Angeles,* 341 U. S. 716; and of a subway conductor who refused to answer questions relating to subversive associations under a statute which authorized discharge when reasonable grounds existed for the belief that the employee was of doubtful trust and reliability, *Lerner v. Casey,* 357 U. S. 468; and of a teacher who refused to answer similar questions, on the ground of "incompetency", *Beilan v. Board of Education,* 357 U. S. 399; and of a social worker for his refusal to answer such questions, under a statute which made refusal "insubordination", *Nelson v. Los Angeles,* 362 U. S. 1. These and other cases, however, indicate that there are constitutional limitations on the state's exercise of these powers. For example, a broad inquiry into other kinds of associations of a non-subversive character may not be made. *Sheldon v. Tucker,* 364 U. S. 479. With respect to disclaimer oaths, the state may not indiscriminately require a disclaimer of innocent as well as knowing association, even with subversive organizations as a condition of

employment. *Weiman v. Updegraff*, 344 U. S. 183. Nor may the disclaimer form be so vague that it is impossible to determine its meaning, so that it acts as an inhibition to free association of an innocent kind. *Cramp v. Florida*, 368 U. S. 278. Also the Court has indicated that in discharging an employee whether because he is found to be a subversive or because he refuses to sign a disclaimer or answer questions, the state must accord the employee procedural due process, *i.e.*, specification of charges and an opportunity to be heard. *Nostrand v. Little*, 362 U. S. 474. It follows, therefore, that while certain inquiries under specified conditions can be made, it does not follow that academic freedom can be destroyed or inhibited on the pretense of protecting the state from disloyalty.

With respect to appellant Starbuck, it is submitted that the inquiry made of him raises serious constitutional questions. While it is clear that under some circumstances the state can inquire into matters which relate to the teacher's fitness and suitability for public employment, *Beilan v. Board of Education*, 357 U. S. 399, it is certain that a state, in exercising this power, cannot exclude a person from public employment by means of an unconstitutional system, *Weiman v. Updegraff*, 344 U. S. 183.

Thus, it would be manifestly improper for the State to deny unemployment under a guise of an alleged inquiry into qualifications where such inquiry itself invades constitutionally protected rights. It is clear that the State does not have an absolute right of inquiry.

In every instance of inquiry, the State must contend with restrictions placed upon it by the Fourteenth Amendment of the Constitution of the United States which applies to the people of the states those freedoms of speech and association embodied in the First Amendment. Thus,

in *Shelton v. Tucker*, 364 U. S. 479, an Arkanas statute was held invalid which required every teacher, as a condition of employment in a state supported school or college, to file annually an affidavit listing, without limitation, every organization to which he had belonged regularly or contributed within the preceding five years. The Court held that the statutes went far beyond what might be justified in the exercise of a state's legitimate inquiry into the fitness and competency of its teachers. It is submitted that the word "ever" and the completely retrospective query made of appellant Starbuck goes beyond the right of legitimate inquiry.

The question as to whether such remote associations as are encompassed by the word "ever" can be inquired of teachers, has not been foreclosed by *Garner v. Los Angeles Board*, 341 U. S. 716. In that case, the disclaimer affidavit containing the word "ever" regarding membership in the Communist Party was upheld. The *Garner* case involved municipal employees and the disclaimer affidavit was not so sweeping as is the one here before the Court. The affidavit there dealt only with membership. Furthermore, the oath requirement which was also upheld in that case was retrospective at most only five years.

In *Beilan v. Board of Education*, 357 U. S. 399, the Court upheld the dismissal of a teacher by a Pennsylvania School Board. The teacher had refused to confirm or refute information as to his activities eight years prior in certain allegedly subversive organizations. However, the Court pointed out at page 405:

> "Petitioner's refusal to answer was not based on the remoteness of his 1944 activities."

It is clear that the Court felt that the substantial issue would have been raised if remoteness had been the basis of the teacher's refusal to answer.

An aspect of the *Garner* case which bears on the constitutional question before us is one that is often overlooked. The State will say that the inquiry here is merely into qualifications and that no determination of eligibility can be made prior to the answering of the question involved. The implication is that appellant, Starbuck, would not necessarily be discharged if he had answered the question in the affirmative. In *Garner*, the Court stated at page 720:

> "Not before us is a question whether the city may determine an employee's disclosure of such political affiliation justifies his discharge."

In the present case, this Court is not confronted with the lack of information noted by the Supreme Court in *Garner*. It is plain what the results of an affirmative answer to the disclaimer question herein would be. In New York, affirmative disclosure of the information being elicited would result in "*prima facie*" evidence of disqualification for appointment to or retention in any office or position in the service to the state or any city or civil division thereof". New York Civil Service Law, Section 105, New York Education Law, Section 3022(2).

The reason for this is that past membership in a subversive organization is "presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith." Rules of the Board of Regents, Article XVIII, Section 244(2).

It is therefore clear that one who answers the question affirmatively would have the heavy burden of bringing in substantial evidence in the very first instance. And it would not matter at what age or under what circumstances the improper activity had taken place. These are circumstances not contemplated in the *Garner* case. Every inquiry into past associations is an encroachment upon

rights granted by the First Amendment. Such admitted encroachments have been allowed by the Supreme Court on the theory that the interests of the State must be balanced by those of the individual. The rationale of the cases which have allowed inquiry into past association of a public employee has been that such information was reasonably necessary to determine an appellant's fitness. Can it be said that an inquiry right to a teacher's birth is necessary in order to determine his fitness? This is the latitude which the word "ever" allows. Furthermore, a heavy burden is placed on a teacher as previously mentioned, if at some time in the distant past he became a member of a group whose present day activities are proscribed. To place such a burden on a person while admittedly infringing on his constitutionally rights of association and speech, cannot be accepted on the basis of an allegedly honest search into qualifications. The more remote the associations and speech looked, the less persuasive the qualifications argument becomes. Therefore, the use of the word "ever" raises the substantial constitutional question as to the point at which the First Amendment operates as a limitation upon state authority to inquire of state employees, particularly faculty members, and to condition employment as a lever to compel an answer.

However, there is more at stake in this case merely than questions of inquiry and the scope of inquiry which can be carried out by a public authority. The statutes and regulations involved in this case are made conditions for employment. An examination of these statutes show that they are not primarily designed to elicit information. They are exclusionary. They are designed to exclude from the public service certain individuals who fall within their

proscriptions. It is with statutory employment conditions that we deal here.

The statutory provisions and their inhibitory effect on academic freedom raise serious questions which should be decided by this Court. At the outset, however, we should direct our attention to the case of *Adler v. Board of Education*, 342 U. S. 485, for the reason that the Court below relied heavily upon it. *Adler* does not dispose of the issues in this case. The complaint in *Adler* was directed only at Section 3022 of the Education Law and Section 12-a of the Civil Service Law. Although the appellants in *Adler* argued before the Supreme Court that Section 3021 was unconstitutionally vague, the Court abstained from ruling upon the question since the issue had not been raised below. See *Adler, supra*, at page 496. In fact, the attack upon the statute in *Adler* upon the grounds of vaguenes was limited to the single word "subversive" as it appears in Section 3022 of the Education Law (see *Adler, supra*, at page 496). The present complaint is more broadly framed; appellants challenge the statutory scheme as a whole, charging that its complexities are so profound and pervasive as to render the entire network unconstitutionally vague. It should be further observed that the present complaint attacks the vagueness of the proscription set out in Section 105 (1) and (2) as well as the remainder of Section 105 of the Civil Service Law. Emphasis is placed upon this fact for the reason that although the Supreme Court in *Adler* stated that they found no constitutional deficiency in Section 12-a of the Civil Service Law, an examination of the briefs in the Supreme Court in that case discloses that the unconstitutionality of that section was not pressed; indeed, it was not even argued as both sides conceded the constitutionality of Section 12-a (appellants' brief, pp. 5-6, 9; appellees' brief,

p. 16). It is not surprising, therefore, that 12-a was so casually passed over by the Supreme Court without analysis or discussion. *Adler* is further not dispositive of the issues in this case for the reason that subdivision (3) of Section 105 of the Civil Service Law was added by the New York Legislature in 1958 (N. Y. Laws, 1958, Ch. 790). This provision, not having existed at the time *Adler* was decided, of course, has not been foreclosed from consideration by that decision. Moreover, this subdivision with its references to the Penal Law raises the questions of the effect of Sections 160 and 161 of the New York Penal Law upon the provisions here involved. Additionally, in 1958, a new paragraph was added to Section 12-a(c) (N. Y. Laws, 1958, Ch. 503). This paragraph, naming the Communist Party of the United States and the Communist Party of New York as proscribed organizations, was added long after the *Adler* decision.

The Trustees Certificate, having been established in 1956, also was not in existence at the time *Adler* was decided and thus the very important constitutional questions which it raises are not foreclosed by that decision, also the issue of the constitutionality of the Regents Rules are not foreclosed by *Adler*, since *Adler* did not consider the validity or constitutionality of the Regents Rules.

By a 1953 amendment to Section 3022 of the Education Law (N. Y. Laws, 1953, Ch. 681), the applicability of the section (and consequently of 105 of the Civil Service Law which is incorporated by reference therein) was extended to include, not only public schools, but institutions of higher learning as well. This provision was not before the Court in *Adler*. Considering that the statutes which this amendment modifies impose serious restrictions upon free inquiry, the impact of this amendment cannot be

lightly brushed aside. Our society relies heavily upon its institutions of higher learning as a source of new ideas. The challenge to orthodox political notions, however disconcerting it may be, or however repugnant it may be to the statutes presently in force in New York, is nevertheless valuable to our political self-awareness. By so depriving our professors and their students of free-inqury, we stimulate the kind of smugness presently seen to impose perhaps a greater threat to our institutions than any which has preceded it. See generally, *Morris, Baggett v. Bullitt;* Scienter and "Guiltless Knowing Behavior", 1 Law in Trans. Q. 185, 189 (1964). The public school and the institution of higher learning are designed to function at different levels and to reduce the latter to the level of the former is to destroy entirely its *raison d'etre.*

Another new and pervasive influence upon the statutes complained of arises from the reference in Section 105(3) of the Civil Service Law to the New York Criminal Anarchy Statute (N. Y. Penal Law, §§ 160, 161). It will be seen that in attempting to assign some meaning to the words "seditious utterance or act", the New York Legislature has further circumscribed the permissible conduct of those affected by the statutes and rules complained of. This amendment was added in 1958, long after *Adler* was handed down (N. Y. Laws, 1958, Ch. 790), and since it affects not only the section in which it appears, but Section 3022 of the Education Law and the Regents Rules as well, these provisions must now be carefully analyzed as to their bearing in the present suit.

With respect to the penal provisions involved in this case, it is respectfully submitted that the Court below erred in its determination that the "looser language" of Section 161 of the Penal Law was not before it.

Subdivision (3) of 105 of the New York Civil Service Law is captioned "Removal for Treasonable and Seditious Acts or Utterances" and provides:

> "A person in the civil service of the state or of any civil division thereof shall be removed therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean 'treason' as defined in the Penal Law, a seditious word or act shall mean 'criminal anarchy' as defined in the Penal Law."

Section 160 of the New York Penal Law provides:

> "Section 160. Criminal Anarchy Defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. *The advocacy of such doctrine either by word or mouth or writing is a felony.*" (Emphasis supplied.)

Section 161 of the New York Penal Law is entitled "Advocacy of Criminal Anarchy". The section then relates what acts, associations and beliefs, constitute the advocacy of criminal anarchy. It is perfectly clear that both sections are intimately bound together. "The advocacy of such doctrine" (N. Y. Penal Law, § 160) is obviously defined in Section 161, and as such, constitutes a part of the complex involved here and is incorporated into Civil Service Law Section 105 (3). There is no need for this Court to go to a dictionary for the definition of "advocacy". The State Legislature of New York has set out the definitions in § 161. The serious constitutional questions raised by these definitions cannot be avoided merely by leaving out the operative sentence of Section 160 (see opinion of the three judge district court, Appendix, *infra*, page 48).

Furthermore, and most importantly, at no stage of the proceedings involved in this case from its inception through

all of the oral arguments and briefs had herein, has the Attorney General of the State of New York or the counsel for the State University of New York denied that Section 161 is included in the complex before this Court. Neither have they denied that a violation of that provision would result in dismissal proceedings under the complex as indeed they could not since the New York Court of Appeals has indicated that two sections are to be construed together.

> "James Larkin, Benjamin Gitlow, C. E. Ruttenberg, and Isaac E. Ferguson, were indicted, tried and convicted for the crime of criminal anarchy *as defined by Sections 160 and 161* of the Penal Law * * *" *People v. Gitlow,* 234 N. Y. 132, at 135. (Emphasis supplied.)

Therefore, the appellants maintain that Section 161 of the Penal Law is before this Court.

Thus, in essence, it is a vastly different statutory scheme which is here attacked than that which was before the Court in *Adler*. Furthermore, the parties attacking these statutes have interests which differ considerably from those parties in the original *Adler* proceeding. As to *Adler's* substance, it can be observed that the Court adhered to the concept of public employment, academic or otherwise, as a privilege. See *e.g., Bailey v. Richardson,* 182 F. 2d 46 [D. C. Cir. 1950], aff'd 341 U. S. 918. It was said in *Adler* that teachers had "* * * no right to work for the state in the school system on their own terms. If they [did] not choose to work on such terms, they [were] at liberty to retain their beliefs and go elsewhere", *Adler, supra,* at p. 492. The Supreme Court, subsequent to *Adler,* has clearly indicated that state employment does not fall into the "privileged classification". *Weiman v. Updegraff,* 344 U. S. 183 at 191-192. See also *Slochower v. Board of Education,* 350 U. S. 551 at p. 555; *Cramp v. Florida,* 368 U. S. 278 at p. 288. Further, *Adler*

was decided before this Court fully recognized the constitutional protection of the right of private association. *NAACP v. Alabama*, 357 U. S. 449. The *Adler* decision also failed to take account of the more lately recognized importance of academic freedom, *Sweezy, supra.* Furthermore, *Adler* relied in part on *Garner v. Los Angeles Board*, 341 U. S. 716 for a point which was expressly not considered in *Garner* and about which the Court stated at page 720 "not before us is the question whether the city may determine that an employee's disclosure of such political affiliation (in the Communist Party U. S. A.) justifies his discharge." In New York, affirmative disclosure of the information being elicited would result in "prima facie evidence of disqualification for appointment to or retention in any office or position in the service of the State or any city or civil division thereof." Also, the Court's reliance on *Garner* was misplaced for the reason that *Garner* did not consider the interests of a state nor those of a professor nor those of society in academic freedom on a university campus. *Garner* does not speak of this set of relationships. That the interests of both the state and an employee in the municipal civil service differ materially and fundamentally from a state's interests in its professorial faculty and a professor's interest in academic employment cannot be denied. Whatever interest the state may have in minimally restricting the speech and association of a municipal civil servant as a condition of his employment, that interest is obviously not of the same order as is its interest with respect to the speech and association of university faculty members. The Court's opinion below indicated that this Court's disposition in *Gerende v. Board of Supervisors*, 341 U. S. 56 has a strong bearing on the issues involved in this case (Appendix, *infra*, page 67). The *Gerende* case does not dispose of any issues in this case. In *Gerende* this

Court affirmed the judgment of the Maryland Court of Appeals on the grounds that "a candidate need only make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government by force or violence' * * *". *Gerende, supra,* at page 67. This Court did not have before it Section 15 of Maryland's Ober Act, which broadly defines a "subversive person", as the Maryland Court had held that the section did not apply to *Gerende, Shub v. Simpson,* 76 A. 2d 332 at 341.

Neither is this case controlled by *Konigsberg v. State Bar,* 353 U. S. 252 and *In re Anastoplo,* 366 U. S. 82, for the reason that has been stated above that there is a difference between a state offering a "privilege" and the state legislating conditions of state employment. Neither is this case controlled by *Beilan v. Board of Education,* 357 U. S. 299, for the reason that in the *Beilan* case the individual involved there could have given the required information and still retained his employment. It will be noted that in the State of New York that result is not the case. The system is exclusionary and not designed to secure information only. For similar reasons, *Lerner v. Casey,* 357 U. S. 468 and *Nelson v. Los Angeles,* 362 U. S. 1, do not control. For the reasons set forth above, a mere recitation of citations involving the employee dismissal cases will not answer the issues raised by the case at bar.

To attempt to foreclose the issues in this case by referring to *Gitlow v. New York,* 268 U. S. 652 is to overlook the present status of *Gitlow.* Justice Frankfurter, while acknowledging that *Gitlow* had never been explicitly overruled, stated, nevertheless, that "* * * it would be disingenuous to deny that the dissent in *Gitlow* has been treated with the respect usually accorded to a decision." *Dennis v. United States,* 341 U. S. 494, 541. Since *Gitlow,* this Court

has decided such cases as *Winters v. New York*, 333 U. S. 507, *Lanzetta v. New Jersey*, 306 U. S. 451, *Cramp v. Florida*, 368 U. S. 278 and *Baggett v. Bullitt*, 377 U. S. 360, which cast further doubt upon *Gitlow's* validity.

Thus the many issues raised by the case are issues not presented in the original *Adler* proceeding. This Court now has the opportunity to critically analyze the statutory provisions involved here and which have been made the contract terms of the appellants, from the point of view of their reasonableness, especially when viewed with regard to First Amendment freedoms and the interests of those whom society should guard most strongly—its academic personnel.

An examination of the provisions involved in this case will show that within the literally hundreds of proscriptions contained therein is conduct and language which the Supreme Court has often recognized in the past as constitutionally protected. Where one is prohibited from the utterance of any word of "criminal anarchy", he is prohibited from discussing in the most abstract manner, those political doctrines which are today opposed to ours; indeed, the Appellate Division of the New York Supreme Court has been of the opinion that the writings of Karl Marx fall within the condemnation of the Penal Law sections. See *In re Lithuanian Workers Literature Soc.*, 196 App. Div. 262, 187 N. Y. 612 (2d Dept., 1921). The sections would also prohibit the carrying on a public street by a university professor of a copy of the Communist Manifesto: "* * * publicly any book * * * containing * * * the doctrine that organized government should be overthrown by force * * *", Penal Law, Section 161(2).

Also included within the prohibitions of the above sections is a college faculty member who "* * * edits * * * any book * * * containing * * * the doctrine that the government

of the United States * * * should be overthrown by force * * * and who * * * embraces the * * * propriety of adopting the doctrine contained therein * * *" (Civil Service Law, 105 (1)(b)).

Thus, New York bars from public employment, not only those who do certain innocent acts, but those who believe in forbidden ideas and concepts as well. It is an extremely serious matter when the state attempts to legislate in the areas of beliefs and this Court has been most careful when dealing in areas involving state compulsion in such matters. See *Torasco v. Watkins*, 367 U. S. 448.

In addition to forbidding innocent activity and belief, the statutes here under consideration prohibit public employment to one who "* * * voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine", Penal Law, Section 161(4). Thus phrased, the proviso is clearly repugnant to the United States Constitution, *DeJonge v. Oregon*, 299 U. S. 353.

It will be observed from a close analysis of the statutes in question that aside from issues involving innocent conduct and speech which are clearly protected by the United State Constitution, that the State of New York has forbidden other conduct and speech upon a lesser standard than do the Smith Act cases. Thus, for example, N. Y. Penal Law, Section 161(1) makes one guilty of a crime who "by word of mouth or writing, advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence * * *". This must be compared with the admonition of the Supreme Court that "We held in *Yates*, and we reiterate now, that the * * * teaching of the moral propriety or even moral necessity for resort to force or violence, is not the same as preparing a group for violent action and sealing

it to such action." *Noto v. United States*, 367 U. S. 291 at 297, 298.

Most importantly, counsel submit that the complex is fatally defective in material parts because its commands are stated in vague and uncertain language which makes it difficult or impossible for those subject to its terms to ascertain its meaning and which permits it to be applied in situations not properly within the scope of state power. For example, Section 3021 of the New York Education Law requires the removal of academic personnel "* * * for the utterance of any treasonable or seditious word * * *". Phrased thus broadly and loosely, it is on its face repugnant to the Federal Constitution. We should ask ourselves is "down" a seditious word? Is "down with the United States Government" a seditious phrase? Justice Frankfurter, by way of *dicta*, has indicated clearly the problem which Section 3021 poses. *Adler v. Board of Education, supra*, at 506 (dissenting opinion). Subdivision (3) of Section 105 of the New York Civil Service Law contains language similar to Section 3021 and, therefore, is similarly questionable. Unlike Section 3021, this subdivision states that "seditious" shall mean "criminal anarchy", as defined in the Penal Law. These definitions, however, do not ameliorate the vagueness of the words purportedly defined. On the contrary, Section 105(3), by equating "sedition" with "criminal anarchy" only further aggravates the language already unconstitutionally vague.

The Court should also note that a college professor has uttered a seditious word and is thus to be barred from public employment where he "* * * justifies by word of mouth * * * the * * * unlawful * * * assaulting of any executive * * * of * * * any civilized nation having an organized government * * * or any other crime * * * with

intent to * * * spread the propriety of the doctrine of criminal anarchy * * *", N. Y. Penal Law, Section 161(3). We are not told what is meant by a "civilized nation" or at what stage in its development a government becomes "organized". Furthermore, "justifies" embraces a multitude of acts so broad as to be limited only by the hearer's prejudices. The range of behavior proscribed by "* * *justifies * * * any crime * * *" is so broad as to define comprehension.

Still another impermissible feature of the complex is the use of the phrase "helps to organize", Civil Service Law, Section 105(1)(c); N. Y. Penal Law, Section 161(4). To be required to ascertain whether one "helps to organize" is to surrender completely to hopeless confusion. It catches the assistant to the assistant.

The questions which Justice White found to be left open by the Washington statute in *Baggett v. Bullitt*, 377 U. S. 360, at 368-73, are similarly left open by the statutes presently complained of. In *Cramp v. Florida*, 368 U. S. 278, the Supreme Court found unconstitutionally vague the requirement that a teacher not lend "* * * aid, support, advice, counsel or influence to the Communist Party". Far more vague is the requirement presently complained of that no academic personnel engage in "treasonable or seditious acts". Both requirements would proscribe constitutionally protected conduct, yet the latter leaves far more room for argument as to the quantum and quality of the conduct which it proscribes.

In a series of cases, the Supreme Court has held that a state has no power, under the First and Fourteenth Amendments, to forbid or command an act which is defined by terms so fluid and vague as not to be susceptible to objective measurement thereby forcing men of common in-

telligence to guess at their meaning and to differ at their application. *Winters v. New York*, 333 U. S. 507, *Lanzetta v. New Jersey*, 306 U. S. 451, and the cases cited therein.

The resulting effect of the broad and vague language contained in the complex under consideration, is that a person engaging in teaching activities in the State of New York will find it impossible to know when some action of his, knowingly or wilfully undertaken, will be construed to be an act falling within the prohibition of the complex. Similarly, he would not know whether a speech or pamphlet of his might also be held to fall within the prohibitions involved in this case. Such uncertainties plainly fail to meet the requirements of due process that legislation must be framed in sufficiently clear terms to permit those subject to it to know where the standards imposed will draw the line between the allowable and the forbidden. The Supreme Court, in *Smith v. California*, 361 U. S. 147, at page 151, declared:

> "This Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may be less required to act at his peril here, because the free dissemination of ideas may be the loser." See also *NAACP v. Button*, 371 U. S. 415 at p. 432-433.

No one can deny that the sweeping breadth and scope of the prohibited conduct with its threats of possible imprisonment as well as loss of employment constitute the type of statutory scheme which will inhibit and deter the First Amendment freedoms of those to whom our society has need to give the freest rein of intellectual inquiry—university professors and scholars.

A striking feature of this complex is the fact that membership in groups which do not advocate forceful over-

throw of the government is presumptive evidence of disqualification for appointment to or retention in the public service of the State of New York. This is the case because the Rules of the Board of Regents provide that:

> "The Board of Regents will issue a list * * * of organizations which the Board finds to be subversive in that they * * * embrace the doctrine that the government of the United States * * * shall be overthrown or overturned by force * * * or that they * * * embrace the * * * propriety of adopting any such doctrine * * *". Article XVIII, Section 244(2).

This must be compared to Civil Service Law, Section 105(c) which proscribes membership in a group "* * * which * * * advocates that the government of the United States * * * shall be overthrown by force or violence * * *".

It is apparent that the State is empowered by virtue of the Rules of the Board of Regents to proscribe membership in groups which merely believe in the proposition that the government of the United States shall be overturned by force. The indefiniteness of such a proscription is readily apparent.

In view of what has been said with respect to the statutory complex here involved as well as its possible inhibitory effects upon academic personnel situated throughout the State of New York, the appellants submit that the issues raised are substantial and merit full plenary review and argument before this Court.

In considering the foregoing arguments, we ask this Court to consider that the threat of criminal prosecution permeates and pervades the statutory scheme. Many of the same acts which will result in a loss of public employment are defined as criminal. While it might be argued that the danger of prosecution is limited, the Supreme Court has stated that First Amendment freedoms

are delicate and vulnerable as well as supremely precious in our society and that the threat of sanctions may deter their exercise almost as potently as the actual application of them. *C. F. Smith v. California,* 361 U. S. 147, at 151-154; *Speiser v. Randall,* 357 U. S. 513, 526. Furthermore, "it would be blinking reality not to acknowledge that there are some among us always ready to fix a Communist label upon those whose ideas they violently oppose. Experience teaches that prosecutors too are human". *Cramp v. Florida,* 368 U. S. 278 at 286-287. In times such as these, with the rapid growth of extreme right wing organizations, it is not unrealistic to consider the threat of prosecution a serious one. In addition, university professors and scholars are extremely vulnerable when operating under such broad and indefinite prohibitions. Their function is to examine, to question, to dispute, to explore unorthodox and unpopular notions. Thus, they are most apt to cause the passions of the community to become aroused. In circumstances such as those, they can, under the penal provisions of this complex, be placed at the mercy of unsympathetic judges and juries. There may not be much hesitancy in reaching a verdict that someone who is unpopular is also a subversive and, therefore, a criminal. Past history shows that it is not only the ignorant who would drag those who pursue social reform into the Communist camp, but also judges, prosecutors, legislators, and candidates for all those offices. By abridging freedom of thought, speech, association and academic freedom through the imposition of this umbrella of prior restraints upon appellants imposed by language which is vague, indefinite and ambiguous, university scholars must, at their peril, guess as to the meanings of the standard imposed and are forced to speculate as to the nature of the penal and other laws which might be applied to them. They are thereby denied reasonable advance

notice of the circumscribed areas involved and thus are inhibited and restricted in the area of constitutionally protected freedoms. This issue, touching as it does, upon hundreds of university educators and scholars, is thus one of extreme significance and importance and merits the full attention of this Court.

**B. The question whether the complex involved here unconstitutionally deprives appellants of due process of law.**

1. *The lack of a hearing.*

In addition to the serious constitutional problems raised by the State requirement that all teachers sign the Feinberg Certificate and the questions raised by the completely retrospective questions asked of appellant Starbuck, coupled with the dismissal for public employment provisions, see *Speiser v. Randall,* 357 U. S. 513, the complex does not afford academic personnel serving on contract and without tenure a formal hearing in respect to non-renewal of their terms.

In Article XVIII, Section 244, of the Rules of the Board of Regents, subdivision (2)(e), the Board of Regents has declared that:

> "In proceedings against persons serving under contract and not under the provisions of the tenure law, the school authority shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal."

Thus, the appellants presently still employed at the State University will have no right to a hearing in the event they are dismissed. This is so despite the fact of Civil Service Law, Section 105(2), since under the new procedures, "refusal of a candidate to answer any question relevant to such inquiry * * * shall be sufficient ground to refuse to make or recommend appointment" (Resolu-

tions, Section 3, Appendix, *infra*, page 90). Under this procedure, the appointment would be refused on grounds that the candidate had blocked an inquiry into his qualifications rather than as disqualification under the complex. Thus, no hearing is afforded.

Appellant Starbuck was appointed pursuant to the New York Civil Service Law in a temporary capacity on September 1, 1963 as a specialist in acquisitions but was dismissed without a hearing on June 18, 1964 for failing to answer a question relative to past political beliefs and actions previously set forth (*supra*, this Statement, page 9). With respect to appellant Starbuck, the State has definitely taken the position that temporary state employees who are discharged for failure to answer the question involved are not entitled to a hearing. Thus, the right of all appellants here to a hearing is clearly an issue.

If there were no possible explanation or defense for failure to give the information requested, then it might be said that a hearing would be unnecessary because such refusal to give the requested information would inevitably result in a conclusion of unfitness. However, there are many reasons why a professor or state employee might not want to answer which in no way would reflect on his loyalty or unfitness for the job. Thus, an opportunity to explain could lift the cloud of suspicion which a refusal to answer would generate. The Supreme Court has recognized the vital importance of a hearing in situations of this type.

In *Slochower v. Board of Education*, 350 U. S. 551, the issue revolved around the New York City Charter which provided for the dismissal from employment of any employee who utilized his privilege against self-incrimination to avoid answering a question relating to his official conduct. The Charter provided in effect, that the dismissal

was to be automatic without right to notice charges or hearing. Slochower, an assistant professor at Brooklyn College, a public institution, exercised his right against self-incrimination with respect to former membership in the Communist Party before a committee of the United States Senate. He was summarily discharged. The United States Supreme Court held that the discharge violated both substantive and procedural due process. In speaking of the procedural aspect, the Court stated, at p. 559:

> "We hold that summary dismissal of appellant violates due process of law."

The Supreme Court has consistently shown its concern with lack of procedural safeguards subsequent to *Slochower*. This can be seen in the instances where the Court has felt obligated to comment upon the question even where the issue had not been raised by the parties.

In *Nelson v. Los Angles County*, 362 U. S. 1, Globe, a municipal employee, was discharged from public employment for refusing to answer certain questions concerning subversion before a sub-committee of the House Un-American Activities Committee. A statute of the State of California made it the duty of any public employee to give such testimony. Since he was a temporary employee, Globe was denied a hearing on his discharge on the ground that he was not entitled to a hearing under the civil service rules of the county. Commenting upon the procedural aspects of the case, the Court stated at page 8:

> "But petitioner here raises no such point, and clearly asserts that "whether or not petitioner Globe was accorded a hearing is not the issue here'."

In Footnote 5, the Court states:

> "Nor does petitioner make any attack on the failure of California's statute to afford temporary employees such as he an opportunity to explain his failure to

answer questions. It will be noted that permanent employees are granted such a privilege."

In *Nostrand v. Little*, 362 U. S. 474, two professors at the University of Washington brought an action challenging the validity of the state's statute which required all public employees to subscribe to an oath that they were not subversive persons or members of the Communist Party or any subversive organization within the meaning of the statute. Refusal to take the oath was made grounds for immediate termination of employment. The Supreme Court of the State of Washington upheld the constitutionality of the statute. However, the United States Supreme Court remanded the case to the Washington Court for a determination as to whether state employees who refused to sign the oath would be entitled to a hearing. The Court used the following language at page 475:

> "One of the claims is that no hearing is afforded at which the employee can explain or defend his refusal to take the oath. The Supreme Court of Washington did not pass on this point. The Attorney General suggests in his brief that prior to any decision thereon here, 'the Supreme Court of Washington should be first given the opportunity to consider and pass upon' it."

On remand, it was stated in the Washington Supreme Court:

> "Implicit in the remand is the implication that, if we hold that such a hearing is not afforded by the Act, it is violative of due process." *Nostrand v. Little*, 361 P. 2d 551, 567.

The Court found a hearing would be required.

An appeal was again taken to the United States Supreme Court which, in a *per curiam* decision, dismissing the case for want of a substantial federal question. *Nostrand v. Little*, 368 U. S. 436.

Justice Douglas, dissenting, stated at page 436:

> "The disposition that the Court makes of the case resolves one of the questions presented by the appeal, *viz.*, that appellants are entitled to a hearing before they can be discharged for refusing to take the oath."

Justice Douglas would have considered the substantive aspects of the case as well.

It is clear from the cases that a teacher has the right to a hearing before discharge from employment where his discharge has been predicated upon his refusal to answer questions concerning alleged subversive activities. The rationale of such a right is no doubt based upon the fact of a recognition by the Supreme Court of the public reaction to a dismissal from employment were questions of subversion are raised.

As was stated in *Baggett v. Bullitt*, 219 F. Supp. 439, at 452:

> "Although discharge of a state employee for failing to fulfill a condition of employment by signing the loyalty oath carries no necessary inference of disloyalty to the employee, it would be ostrich-like to ignore the practical realities of a public opinion which tends to attach a stigma of disloyalty to such a discharge, a stigma which may have a profound effect on the discharged employee's future employment and social and economic status. The severe impact of such a discharge upon an employee whose refusal may be motivated by considerations unrelated to disloyalty, invokes the protection of due process with compelling force."

With such a rationale, it is unlikely that the Supreme Court would distinguish between tenured and non-tenured teachers. *Baggett v. Bullitt*, 377 U. S. 360, involved non-teachers among others who were summarily discharged for failing to subscribe answers to a loyalty oath and an oath of allegiance.

The oaths were declared unconstitutional on vagueness grounds, however, it is interesting that Justices Clark and Harland, in dissenting, stated at page 384:

> "Likewise, in view of the decision of Washington's highest court that tenured employees would be entitled to a hearing * * * the due process claim is without foundation. This conclusion would also apply to those employees without tenure, since they would be entitled to a hearing under Washington's Civil Service Act * * *"

The State of New York has taken the position that Starbuck, as a temporary state employee, is not entitled to a hearing. Under the procedures involved, the other appellants are not entitled to a hearing also.

Thus the questions presented by this aspect of the case are substantial in that they directly raise fundamental constitutional issues with respect to the power of a state to discharge non-tenured and temporary state employees without a hearing where questions relating to subversion are involved.

It is submitted that the Court below fails to meet this issue squarely. The Court evidently upheld the discharges without a hearing on the grounds that a hearing is provided where an affirmative answer to the question is given. That, of course, was not the issue. The Supreme Court has been concerned with the issue of a hearing where there has been a refusal to answer.

From the above analysis, it can be seen that termination of public employment is automatic, "it matters not whether the * * * [failure or refusal] resulted from mistake, inadvertence, or legal advice conscientiously given, whether wisely or unwisely", *Slochower v. Board of Education*, *supra*, 350 U. S. at 558, or happens to rest upon honest belief that the United States Constitution prohibits such

inquiry as is made into a person's thoughts and speech. *C. F. Konigsberg v. State Bar, supra*, 353 U. S. 252. There is here no concern for the employee's reasons, whether they are with or without justification. Even if a public employee holds the steadfast conviction that the federal constitution shields him from being compelled to make the disclosures required, the procedures here provided only two alternatives: either to answer or to suffer summary discharge from state employment.

With respect to the employee dismissal cases cited by the Court below, it should be pointed out that this case is distinguishable from those cases wherein discharge (or denial of application) has been predicated upon refusal of the individual to respond to proper questions. In each of the cases cited by the Court below, the individual involved was accorded an opportunity to delineate formally, for the record, the reasons for his non-response. See, *Nelson v. County of Los Angeles*, 362 U. S. 1, *Konigsberg v. State Bar*, 366 U. S. 36, *In re Anastaplo*, 366 U. S. 82. See also *Beilan v. Board of Education*, 357 U. S. 399 (a teacher's dismissal followed a formal hearing), *Lerner v. Casey*, 357 U. S. 468 (the statute required dismissal to be "after investigation" and "based upon all the evidence". Furthermore, in that case, Lerner appeared before the Department of Investigation three times, twice with counsel.). Thus the crucial constitutional distinction involved in the employee dismissal cases and the case at bar is evident.

This case presents this Court with a clean issue as to the right of a hearing to the appellants involved. It seems that in no case before this Court has a definitive determination of the issue been had. The issue has, of course, arisen collaterally in cases previously mentioned. This Court should finally resolve the matter as it is serious and im-

portant, as it concerns the lives of hundreds of people throughout the State University system. And see generally Murphy, "Academic Freedom—An Emerging Constitutional Right", 28 Law and Contemporary Problems, 447, 481-483.

2. *The burden of proof is shifted.*

The membership portion of the statutory scheme involved provides that no one shall obtain or retain public employment in the State of New York who "* * *become a member of any society or group of persons which teaches or advocates that the government of the United States or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means", Civil Service Law, Section 105(1)(c). See also Penal Law, Section 161(4).

Civil Service Law, Section 105(2), Education Law, Section 3022(2) and the Rules of the Board of Regents, Article XVIII, Section 244(2) provide in essence that the Board of Regents shall after inquiry and notice, make a listing of organizations which it finds to be subversive, in that they violate the provisions of former 12-a of the Civil Service Law (now Section 105). It is further provided that evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such listings shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Additionally, evidence of membership in such an organization prior to the said date shall be presumptive evidence that membership has continued in the absence of a showing that such membership has been terminated in good faith. Furthermore, once a determination of ineligibility has

been made, the party declared ineligible may have a hearing in the Courts at which time the person declared ineligible shall have an opportunity for cross examination. Once the party involved has presented substantial evidence contrary to the presumptions mandated by the statute, the burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the evidence shall be upon the person making such order.

The obvious purpose and effect of the *prima facie* characteristic of the statute, together with the listing authority, is to relieve the State from the burden of having to prove in any disciplinary hearing the major elements of its case. At any hearing, only one fact need be established: membership. Having done so, the State can rest. This is so, since under the Regents' listing of the Communist Party of the United States and of New York, the State would be able to avoid independent proof as to the nature of the organization listed. Thus, the individual involved would be faced with the onerous burden of rebutting the presumptions created. All membership is deemed guilty membership by reason of the fact that at any hearing the only issue involved with respect to organizations listed the employee's knowledge of its ends and goals. Without benefit of trial, members of the proscribed organization are branded and stigmatized with the illegal aims of the group. Nothing further need be shown except that the individual is a knowing member of the organization. And for such membership, the scholar or teacher involved, or indeed, any member of the Civil Service of the State of New York is forever barred from employment in the service of the State. This is guilt by association with a vengeance. Appellants maintain that if one ignores semantics for substance, there has been an unconstitutional shifting of the burden of proof within the hold-

ing of *Speiser v. Randall*, 357 U. S. 513. The basic holding of *Speiser* is that when First Amendment freedoms are at stake, the burden of proof cannot be shifted to the individual. The State here will maintain that the burden of persuasion in the whole case is always on the one bringing the charges. But the statutory language cannot alter fact. The fact is that the major elements of the State's case are initially presumed. Appellants maintain that the rationale of *Speiser* is broad enough to cover the case at bar and that thus a serious and important constitutional question is raised. *Speiser* turned on the vital importance of First Amendment freedoms and it would be remarkable if the Supreme Court were to allow that decision to become a shell by upholding systems which presume all major elements of a state case except one.

Additionally, with respect to appellant Starbuck, the State has demanded of him, as was demanded of the individuals in *Speiser v. Randall, supra*, that he take the first step, execution of an answer to the question. Clearly requiring the execution of an answer to the question places the burden of persuasion and proof upon appellant Starbuck, and necessarily results in the deterrents of speech which the Constitution makes free. It presumes guilt and non-employability of all state employees, presuming either that they advocate the prohibited doctrines, or that they are members of the prohibited organizations. If and only if Starbuck comes forward and executes the proper answer will he become a member of the favored group, the group eligible for State employment. The question is asked of all alike—the loyal and the disloyal. In other words, the question presumes non-employability and then shifts onto Starbuck on pain of prosecution for perjury, the task of determining his own eligibility. Such a procedure is prohibited to the State, *Speiser v. Randall, supra*. The ques-

tions raised by this type of procedure are substantial and merit a full hearing by the Court.

**C. The question whether the complex is a bill of attainder.**

There is raised by this lawsuit the question of whether the statutory scheme here under attack is a bill of attainder. Appellants maintain that the complex inflicts punishment without a judicial trial. While this Court has not yet decided that loss of public employment constitutes punishment, see *Garner v. Los Angeles Board*, 241 U. S. 716 at 721, it seems clear that

> "Disqualification from the pursuits of a lawful avocation * * * may also and often has been imposed as punishment." *Cummings v. Missouri*, 4 Wall 277 at p. 320.

New York Civil Service Law 105(1)(c) provides that no one shall obtain or be retained in public employment who

> "* * * become a member of any * * * group of persons which * * * advocates that the government of the United States or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means.
>
> For the purposes of this Section, membership in the Communist Party of the United States of America or the Communist Party of the State of New York shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil subdivision thereof."

It is no argument to say that the State has merely created a rule of evidence with respect to membership in certain groups which the individual involved can rebut. The fact of the matter is that under the system as set up by the State, members of the Communist Party of the

United States of America and the Communist Party of the State of New York are presumed guilty and disqualified from public employment unless they can first remove the guilt. The serious constitutional questions raised by such a system have come before the Supreme Court in another context. Thus, in *Cummings v. Missouri*, 71 U. S. 277, at page 320, the Court stated:

> "The existing clauses presume the guilt of the priests and clergymen and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is affected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the lawmaker in the case opposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly, cannot be done indirectly. The Constitution deals with substance, not shadows."

The Court below, in holding the complex not to be a bill of attainder, placed particular reliance upon the fact that the proscription was not based on an original determination by the State Legislature of the aims of the Communist Party but rather was based upon the findings of the Board of Regents which, after extensive hearings, listed the two organizations under Section 3022 of the New York State Education Law.

This reasoning ignores the fact that the Board of Regents listed the Communist Party of the United States and the Communist Party of the State of New York as proscribed organizations *in 1953* (emphasis supplied). The crucial constitutional factor involved here is that the State Legislature took cognizance of the listing by the Board of

Regents *in 1958* (emphasis supplied), five years after the original determination.

It is clear from the preamble to the amendment incorporating the reference to the two parties that the purpose of the reference was to bring Section 105 into harmony with the determination of the Board of Regents under Section 3022. N. Y. Session Laws, c. 503, § 1 (Appendix, *infra*, page 59). An examination of that preamble indicates that the Legislature considered nothing other than the fact of listing by the Board of Regents.

It seems clear, therefore, that the Legislature of the State of New York in 1958 made an original determination that the Communist Party of the United States and the Communist Party of the State of New York were organizations which fell within the prohibitions of the complex involved here. The Legislature must have found, that is, as of 1958 at least, that the organizations listed by the Board of Regents in 1953 continued to possess the characteristics which had led to the original listing. Thus we had a "trial by Legislature", *United States v. Brown*, 381 U. S. 437 at 442.

The seriousness and substantiality of the federal questions raised by the manner in which the New York Legislature has proceeded to move forward in this case are readily apparent. The New York Legislature could not constitutionally assume that the findings which underlay the listing of the organizations involved in 1953 were sufficient to support the legislative amendment of 1958. It is submitted that after a period of five years, such findings by the Board of Regents were stale. It is further submitted that since it is First Amendment freedoms we are dealing with, the remoteness of the findings is certainly an element which the Court should consider. The com-

plex is a bill of attainder and the manner in which the State Legislature has proceeded should be carefully scrutinized by the entire Court.

**D. The question whether the New York complex is an *ex post facto* enactment.**

It has previously been mentioned that the statutory scheme in New York is essentially exclusive and is not designed merely to elicit information. Information as to past activity in subversive groups brings into play the exclusionary mechanism of the statute and the application of legislatively determined presumptions. It cannot be denied that presumptions once operative present a formidable barrier to continuing employment. Past membership in proscribed groups is presumed to have continued unless termination of such membership in good faith can be shown. Clearly to burden an employee with such a presumption for an act remote in the past, which act may have taken place prior to the enactment of the legislation, is to punish that individual for innocent past acts. Indeed, such membership may have been in the 1930's when the Communist Party, for example, was just another political party, see *Cramp v. Florida,* 368 U. S. 278 at 286. To allow the projecting back of present anxieties and fears to acts which in the past were innocent, presents a real danger to our liberties. The creation of the presumption here is punishment since the consequences of the presumption are substantial. Further, the impact of this *ex post facto* enactment on First Amendment freedoms is considerable. The vice in this complex is that it creates a disability for conduct which has already taken place. To sanction such a principle leaves no speech or association of the present protected.

When considering this question, we ask this Court to take note of the fact that there is a distinction between legislation where the *ex post facto* elements create a substantial disability as in our case with the creation of presumptions, and legislation where the *ex post facto* elements require compulsory revelation without specific consequences as in many employee dismissal cases. The first situation with its officially imposed disadvantages is truly *ex post facto*, while the second, equally offensive, has its greatest impact in the area of the First Amendment freedoms.

In view of the above, it is believed that the question presented by this appeal with respect to the *ex post facto* provisions of the complex are substantial and directly raise fundamental constitutional issues. See *Calder v. Bull*, 3 U. S. 386 at p. 390. See also *Cummings v. Missouri*, 71 U. S. 277 (it is now clear that legislation which is essentially punitive cannot escape censor merely because it is cast in civil form).

## Conclusion

The statutory scheme involved here is highly unique and complex. The constitutional issues involved are those which are continually rising in an age when international distrust and fear have become a way of life. See *Baggett v. Bullitt*, 377 U. S. 360 at 366. The State will indicate that the government's purpose in enacting and enforcing these statutes is the elimination of those tainted with disloyalty from the school system of the State. If we assume *arguendo*, that such a legitimate State need in the present circumstances, the State, according to the decisions of this Court is still not free to subjugate liberties if its desired ends can alternatively be achieved in a manner which is less restrictive of constitutional rights.

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of the legislative abridgement must be viewed in the light of less drastic means for achieving the same purpose." *Shelton v. Tucker*, 364 U. S. 479 at 488.

Applying this concept to the case at bar, appellants believe that a substantial federal question is raised as to the unconstitutionality of this complex and that the State's purpose could obviously be accomplished in a manner which does not involve a wholesale invasion of constitutional rights. The statutes are a jumble of vague, broad, indiscriminately worded provisions which severely impair constitutional rights without any evidence that there are not less restrictive means to accomplish the basic State purpose.

It is submitted that the elimination of the statutes will in no way interfere with the State's goal of obtaining fit and competent teachers nor will it prevent the imposition of honest and legitimate qualifications for the teaching profession. Men have struggled for centuries to establish and preserve the delicate freedoms with which we are here concerned. These freedoms cannot be preserved where a public authority can demand of an individual that he make a choice between his constitutional liberties and his economic well-being. It is only too evident that confronted with such a decision, most men, reluctant though they may be, will choose to feed their families rather than make a stand. There were hundreds at the University of Buffalo who were opposed to the certificates in question. Only five had the courage to stand against economic coercion. This is not to say that the stature of those who op-

posed the certificates, but who in the end signed, should in any way be diminished. They acted from an impulse profoundly basic in any society—the impulse to preserve and maintain the economic status of their families. The very fact that men can be put to the test in such a manner is reason enough for this Court to critically analyze the complex before it.

Respectfully submitted,

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ROSARIO J. DILORENZO, with
RICHARD LIPSITZ, *on the Statement.*

# APPENDIX

## Opinion

## UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD, and GEORGE E. STARBUCK,

*Plaintiffs,*

v.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

*Defendants.*

Civil Action File No. 10,994.

Before: MOORE, *U. S. C. J.*, BURKE, *Ch. J.* and HENDERSON, *U. S. D. J.*

Appearances:

Richard Lipsitz, of Lipsitz, Green and Fahringer, Buffalo, New York (Rosario J. DiLorenzo on the brief), for plaintiffs.

John C. Crary, Jr. (Richard A. Foster and David L. Segal on the brief), for defendants Board of Trustees—State University of New York, State University of New York at Buffalo, Clifford C. Furnas, Samuel B. Gould, and J. Lawrence Murray.

Ruth Kessler Toch (Louis J. Lefkowitz, Attorney General of the State of New York, on the brief), for defendants Board of Regents of the University of the State of New York, Department of Civil Service of the State of New York, Civil Service Commission of the State of New York, Mary Goode Krone, and Alexander A. Falk.

MOORE, *C. J.*

This suit challenges the constitutionality of Sections 3021 and 3022 of the New York Education Law, Section 105 of the New York Civil Service Law, Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York, and the procedures used under these various statutes and regulations. Section 105 of the Civil Service Law and Sections 3021 and 3022 of the Education Law, as they are now in effect, are set forth in the margin.[1]

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[1] *Civil Service Law*

§ 105. *Subversive activities: disqualification.*

1. Ineligibility of persons advocating overthrow of government by force or unlawful means. No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal or teacher in a public school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises, or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overthrown or overturned by force, violence or any unlawful means; or

(b) prints, publishes, edits, issues or sells any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

(c) organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

(Footnote continued on following page)

Section 244 of Article XVIII of the Rules of the Board of Regents, promulgated after the enactment of Section 3022 of the Education Law, provides that school authorities shall put into effect certain procedures for disqualification and removal of employees who violate Section 3021 of

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(Footnote continued from preceding page)

For the purpose of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof.

2. A person dismissed or declared ineligible pursuant to this section may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and if the final determination shall be in his favor he shall be restored to his position with pay for the period of such suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

3. Removal for treasonable or seditious acts or utterances. A person in the civil service of the state or of any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean "treason", as defined in the penal law; a seditious word or act shall mean "criminal anarchy" as defined in the penal law.

*Education Law*

§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.*

A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonble or seditious act or acts while holding such position.

§ 3022. *Elimination of subversive persons from the public school system.*

1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members *and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof* who violate the provisions of sections

(Footnote continued on following page)

the Education Law or Section 105 of the Civil Service Law. Before appointment of an employee, the nominating official shall inquire of his former employers and of others whether he is known to have violated the statutory provisions, and no person found to have violated the statutes shall be eligible for employment. Each year school authorities shall prepare a report on each employee, stating whether there is any evidence, including membership in an organization listed as subversive by the Board of Regents, indicating that the employee has violated the statutes. If there is such evidence, the reporting official is to recommend the employee's dismissal, and within 90 days after the recommendation has been submitted, the

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(Footnote continued from preceding page)

three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

Section 12-a of the Civil Service Law, referred to in Section 3022 of the Education Law, now appears as Section 105(1) and (2) of the Civil Service Law, N. Y. Sess. Laws, ch. 790, § 105.

school authorities must either prefer formal charges or reject the recommendation. If charges are preferred against persons serving on probation or having tenure, statutory dismissal procedures shall be followed. "In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings * * * as they deem the exigencies warrant, before taking final action on dismissal. In all cases, all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed."

The State University of New York at Buffalo, attempting to comply with the Regents' rules, distributed to all members of the academic staff a booklet containing the Regents' rules and the underlying statutes, and required each faculty member to sign a certificate (the "Feinberg certificate") declaring that he had read the Regents' rules; that the rules and the statutes cited therein constituted terms of his employment; and that he was not now a member of the Communist Party and if he ever had been, he had communicated that fact to the president of the university.

Four of the five plaintiffs in the present action—Keyishian, Hochfield, Garver, and Maud, all under term appointments to the academic staff of the University—declined to sign the certificates, and were notified that if they did not sign as requested their terms would not be renewed on grounds of insubordination. Keyishian's term has ended and his appointment has not been renewed. The terms of two of the other three have not expired and they remain in their former positions. They have been informed that dismissal proceedings will not be started against them until the validity of the statutes, rules, and procedures is de-

termined in the present suit. Maud accepted a position after his term expired in September 1965, again subject to the determination of the present suit, but has resigned from the university.

The fifth plaintiff, Starbuck, was appointed on September 1, 1963, to a one-year term as a specialist in acquisitions for the library. After starting work he was required to fill out a form, one question of which asked: "Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the government of the United States or of any political subdivision thereof should be overthrown or overturned by force, violence, or any unlawful means?" He refused to answer and was dismissed from his appointment on June 18, 1964.

On July 8, 1964, the plaintiffs brought a class action against a large part of the educational hierarchy of the State of New York, seeking an injunction against enforcement of the civil statutes concerning employment of subversives and of the regulations and procedures used to implement those statutes. The District Court held that no substantial federal question was raised, and accordingly refused to refer the case to a three-judge district court. 233 F. Supp. 752 (W. D. N. Y., 1964). The Court of Appeals for the Second Circuit reversed and directed that the case be heard before a three-judge court. 345 F. 2d 236 (2 Cir., 1965).

I. *The Constitutionality of the State's Objective.*

The plaintiffs argue in part that the complex of laws, regulations, and procedures under attack has no constitutionally valid objective—that they infringe upon freedom

of expression without being justified by any legitimate state interest.

The Supreme Court in the *Adler* case, considering statutes the predecessors of the ones now in question, described the importance of the state interest in preventing the use of the educational system as a platform for urging students to overthrow government by violent means:

> "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted."
>
> *Adler v. Board of Education,* 342 U. S. 485, 493 (1952).

The Supreme Court has not changed its recognition of the importance of this state interest in recent cases. In 1958, it quoted the above language from *Adler* with approval, in upholding the dismissal for "incompetency" of a Pennsylvania school teacher who refused to answer a question as to his activities in the Communist Party. *Beilan v. Board of Public Education,* 357 U. S. 399 (1958). In *Barenblatt v. United States,* 360 U. S. 109 (1959), the Court upheld the contempt conviction of a former teaching fellow at the University of Michigan, based on his refusal to answer questions of a congressional committee as to his past and present membership in the Communist party. The Court indicated that Congress had a legitimate interest in "inquiring into the extent to which the Communist Party has succeeded in infiltrating into our universities * * * persons and groups committed to furthering the objective of overthrow." 360 U. S. at 129. In

*Cramp v. Board of Public Instruction*, 368 U. S. 278 (1961), the Court struck down as unconstitutionally vague a Florida statute requiring state employees to swear that they had never lent their "aid, support, advice, counsel, or influence to the Communist Party"; but the Court did not "question the power of a State to safeguard the public service from disloyalty." 368 U. S. at 288. Nor does the recent decision of *Baggett v. Bullitt*, 377 U. S. 360 (1964), cast any doubt upon the power of a state to act to prevent the incitement of violent overthrow on university campuses.

The plaintiffs argue that the legitimate state objective recognized by the Court in *Adler* is not present here, since the teachers here hold positions at universities rather than at public schools. The argument appears to be based upon the comparative maturity of mind of the university student, which entitles him to the privilege of exposure to conflicting political philosophies. But as the American Association of University Professors wrote in their *amicus* brief in *Barenblatt, supra*, a case involving a university teacher, "The claims of academic freedom cannot be asserted unqualifiedly. The social interest it embodies is but one of a larger situation, within which the interest in national self-preservation * * * also prominently appear[s]." Brief, p. 24. It would not be constitutional to prevent the *teaching* of Communist philosophy at the university level; but it would be dangerously anomalous to proscribe the *advocacy* of violent overthrow of government in all parts of the United States, see *Dennis v. United States*, 341 U. S. 494 (1951), except in the breeding-grounds of the future leaders of the nation. The interest in national self-preservation—"the ultimate value of any society," *Dennis* at 509—applies to the university campus as well as to the rest of our society.

II. *The Constitutionality of the Means Used to Attain the State's Objective.*

The plaintiffs maintain that even if the statutes and regulations under attack assert a legitimate state objective, they do so in a manner which unduly restricts other interests protected by the Constitution. The plaintiffs invoke a variety of constitutional clauses in support of their position.

*A. The Ex Post Facto Clause.*

An *ex post facto* law is "one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Cummings v. Missouri*, 71 U. S. 277, 325-26 (1867).

In the present case, the plaintiffs either have been dismissed or are threatened with dismissal for failure to answer questions put to them under procedures designed to implement § 3022 of the Education Law, which was made applicable to colleges in 1953. Before being dismissed or threatened with dismissal, the plaintiffs were repeatedly told the purpose of the questions, the statutory basis for the questions, and the possibility that dismissal proceedings would be started if they failed to answer the questions. The proscription of their conduct preceded the conduct itself, so that the *ex post facto* clause does not apply. See *Garner v. Board of Public Works*, 341 U. S. 716, 721 (1951), in which the Court rejected an argument that dismissal of municipal employees for failure to take an oath was *ex post facto* punishment, with the observation that the activity covered by the oath had been proscribed years before the employees were asked to take the oath.

*B. The Bill of Attainder Clause.*

"Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment of them without a judicial trial are bills of attainder prohibited by the Constitution." *United States v. Lovett,* 328 U. S. 303, 315-16 (1946). The plaintiffs contend that Section 3022 of the Education Law, coupled with the Regents' regulations under that section and Section 105(1)(c) of the Civil Service Law, constitute a bill of attainder, since these provisions single out as ineligible for employment in state schools members of the Communist Party of New York and of the Communist Party of the United States. A similar argument was made and rejected in the *Adler* case.

The plaintiffs put particular reliance on *United States v. Brown,* 381 U. S. 437 (1965), in which the Court held unconstitutional as a bill of attainder a statute making it criminal for anyone "who is or has been a member of the Communist Party" to serve as an officer of a labor union within five years of the termination of his membership in the Communist Party. However, the statute attacked in the *Brown* case differs fundamentally from the statutes and regulations challenged here in the nature of the part played by the legislature in determining the underlying facts from which adverse consequences would follow. Assuming without deciding that dismissal from state employment can constitute "punishment"—a question left open in *Garner,* 241 U. S. 716 at 721 (1951) and not touched upon in *Brown*—the bill of attainder clause only forbids "punishment" imposed by a legislature as a result of "trial by legislature." *Brown,* 381 U. S. at 442. It is the unfairness of trial by a large body "peculiarly susceptible to popular clamor," 1 Cooley, Constitutional Limita-

tions, 536-37 (8th ed. 1927) that underlies the bill of attainder clause. The Court in *Brown* faced a statute involving just such a "trial by legislature"—a statute which specified the Communist Party by name, and made it a crime—automatically and incontestably—for a Party member to hold union office.

In the present case, disqualification from employment in the state schools did not follow automatically from a legislative determination that the Communist Party was a bad organization. Section 3022 of the Education Law provided that the Board of Regents shall, after full notice and hearing, make a list of organizations which it finds advocate the doctrine that government should be overthrown by force, violence, or other unlawful means. It was only after extensive hearings that the Board of Regents lists two organizations under Section 3022; the Communist Party of New York and the Communist Party of the United States. These determinations were subject to judicial review under Article 78 of the Civil Practice Act, now Article 78 of the Civil Practice Law and Rules. *Thompson v. Wallin,* 301 N. Y. 476, 493, 95 N. E. 2d 806 (1950), *aff'd sub nom. Adler v. Board of Education,* 342 U. S. 485 (1952).

Section 105(1)(c) of the Civil Service Law, which makes membership in either the Communist Party of New York or that of the United States "*prima facie* evidence" of disqualification for the state civil service, was based not on an original determination by the state legislature of the aims of the Communist Party, but upon the findings of the Board of Regents under Section 3022 of the Education Law. The preamble to the amendment incorporating the reference to the two parties makes clear that the purpose of the reference was to bring Section 105 into harmony with the determinations of the Board of Regents

under Section 3022. N. Y. Sess. Laws 1958, c. 503, § 1.[2]

Again unlike the statute struck down in *Brown*, Sections 105(1)(c) of the Civil Service Law and 3022 of the Education Law make membership in the Communist Party only "*prima facie* evidence of disqualification" from state employment. The presumption is rebuttable; at a hearing, the employee "may deny (a) membership; (b) that the organization advocates the overthrow of the government by force; and (c) that he has knowledge of such advocacy." *Lederman v. Board of Education*, 276 App. Div. 527, 530, 96 N. Y. S. 2d 466, 470 (2d Dept. 1950), *aff'd sub nom. Thompson v. Wallin*, 301 N. Y. 476, 95 N. E. 2d 806 (1950), *aff'd sub nom. Adler v. Board of Education*, 342 U. S. 485 (1952). As the New York Court of Appeals stated in *Thompson v. Wallin*:

> "The phrase 'prima facie evidence of disqualification' * * * imports a hearing at which one who seeks appointment to or retention in a public school position

[2] The text of the preamble is as follows:

> *"Declaration of legislative intent.*
>
> The legislature takes cognizance that section three thousand twenty-two of the education law makes provision for the implementation and enforcement of section twelve-a of the civil service law [now Section 105 of the Civil Service Law] with respect to the elimination of subversive persons from the public school system; that such section three thousand twenty-two authorizes the board of regents, after notice and hearing, to list
>
> 'organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law';
>
> that the board of regents, after notice and hearing, has so listed the communist party of the United States of America and the communist party of the state of New York; and that pursuant to such section three thousand twenty-two and rules and regulations adopted thereunder membership in either such organization constitutes *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state. It is the intent of the legislature to apply to all officers and employees subject to section twelve-a of the civil service law the same provision that membership in either of such organizations shall constitute *prima facie* evidence of disqualification for appointment or continued employment.

> shall be afforded an opportunity to present substantial evidence contrary to the *prima facie* evidence * * *. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence."

301 N. Y. 476 at 494, 95 N. E. 2d 806 at 814-15. See also *Hughes v. Board of Higher Education,* 309 N. Y. 319, 130 N. E. 2d 638 (1955).

The disqualification of a teacher under these laws, in short, is not the result of a "legislative trial". The legislature in the first instance—in enacting Section 3022 of the Education Law—did nothing more than, in the language of *Brown,* 381 U. S. at 450, "set forth a generally applicable rule" as to the characteristics of organizations, membership in which should be evidence of disqualification. The determination of what organizations possessed those characteristics was left to an administrative body, to be made after notice, hearing, and opportunity for judicial review. The case closely resembles *Communist Party v. Subversive Activities Control Board,* 367 U. S. 1 (1961), in which the Court, holding that the Subversive Activities Control Act of 1950 was not a bill of attainder, stressed the "crucial constitutional significance of what Congress did when it rejected the approach of outlawing the Party by name and accepted instead a statutory program regulating not enumerated organizations but designated activities," 367 U. S. at 84-85, and pointed out that the initial findings under the Act "must be made after full administrative hearing, subject to judicial review * * *." *Id.* at 87.

If anything, the statutes now under attack are less like a bill of attainder than the act held constitutional in *Communist Party v. Subversive Activities Control Board,* since the New York statutes provide opportunity for hearing and judicial review not only for the organizations listed,

but also for their members. In short, in terms of a recent analysis of the history and purpose of the bill of attainder clause, the New York legislature here laid down "rules of general applicability", leaving "the job of application to other tribunals." Comment, The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause, 72 Yale L. J. 330, 347, 350 (1962).

*C. The Due Process Clause.*

Plaintiffs' principal challenge to the New York statutes and procedures is based on the protection afforded to free speech by the First Amendment, applicable to the states under the Fourteenth Amendment. Plaintiffs maintain that the New York laws and procedures impinge upon the rights of freedom of speech, thought, and expression more than is necessary to protect the state from violent overthrow, both by being too broad and vague, and by imposing an unfair burden on those who may be adversely affected, requiring them to justify their conduct.

*1. Procedural Due Process and Speiser v. Randall.*

Plaintiffs' "burden of justification" argument rests in large part on *Speiser v. Randall*, 357 U. S. 513 (1958), in which the Court held to be against due process a California statute which required veterans to file oaths declaring that they did not advocate the overthrow of government by force, violence, or other unlawful means, before they could receive a state tax exemption. The essence of the Court's opinion was that by putting the burden of taking the first step and of proving eligibility on the applicants, the statute made it more likely that the exemption would be denied in borderline cases, and therefore that "legitimate utterance will be penalized." 357 U. S. at 526. The Court distinguished the *Garner* and *Douds* cases, in which

oaths were upheld as valid prerequisites to state employment and union office, by pointing out that those cases "concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety," *id.* at 527, and that in those cases persons by taking the oaths could retain their positions subject to further proceedings in which the government would have the burden of proof. The Court also distinguished the New York statutes upheld in *Adler*, on the grounds that under those statutes "public-school teachers could be dismissed on security grounds only after a hearing at which the official pressing the charges sustained his burden of proof by a fair preponderance of the evidence." 357 U. S. at 528 n. 8.

Later decisions have made clear that *Speiser* does not create a rule of law that a potential suspect in an area concerning freedom of speech must never be called upon to justify his conduct. *E.g., Nelson v. County of Los Angeles,* 362 U. S. 1 (1960), upholding discharges of county employees based upon their refusal to answer questions concerning subversive activities put to them by a congressional subcommittee; *Konigsberg v. State Bar,* 366 U. S. 36 (1961) and *In re Anastaplo,* 366 U. S. 82 (1961), holding that admission to a state bar could be denied on the basis of an applicant's refusal to answer questions concerning Communist activities. Instead, *Speiser* holds that in a case concerning First Amendment freedoms, the burden of proof must rest upon the attacker as much as possible, consonant with the protection of the legitimate interest asserted by the attacker.

In the present case, the university requirement that all teachers sign "Feinberg certificates" may have raised problems under *Speiser,* although apparently the teachers could retain their positions by signing the certificates, sub-

ject only to further proceedings in which the state would bear the burden of proof. But the university has discontinued its reliance on the certificate procedure, as of June 10, 1965. The state now investigates prospective appointees by asking the candidate and others questions concerning his compliance with the laws. The candidate is given a chance to explain his doubts, not provided under the certificate procedure. Absolute refusal to answer is made grounds for refusal to appoint; but this seems reasonable, in light of the opportunity to explain. Persons employed before June 10, 1965, shall not be deemed disqualified "solely by reason of" their failure to sign the Feinberg certificate. The State thus would have the burden of showing violations of the statutes, following the statutory procedures for dismissal as to teachers with tenure.

Plaintiffs maintain that teachers serving on contract and without tenure are denied procedural due process, since they are guaranteed by the Regents' regulations only "such hearings * * * as [the school authorities] deem the exigencies warrant * * *." In particular, plaintiffs point to the dismissal of Starbuck as evidence that the state will not give an adequate hearing to teachers without tenure.

It appears that after Starbuck failed to answer the question about subversive activities on his employment form, he was told that he must answer it yes or no, and could explain if he answered yes. He did not answer, and was dismissed. We understand the law of New York to be in accordance with the advice given to Starbuck by the university officials. Although a teacher without tenure, Starbuck would have had an opportunity to explain and a right to a full hearing on whether or not he had violated the substantive provisions of the law, if he had answered the question yes. *Hughes v. Board of Higher Education,*

309 N. Y. 319, 130 N. E. 2d 638 (1955); *Lederman v. Board of Education*, 276 App. Div. 527, 96 N. Y. S. 2d 466 (2d Dep't 1950), *aff'd sub nom. Thompson v. Wallin*, 301 N. Y. 476, 95 N. E. 2d 806 (1950), *aff'd sub nom. Adler v. Board of Education*, 342 U. S. 485 (1952). In light of this opportunity for explanation and a hearing, Starbuck cannot complain of lack of procedural due process. His dismissal was for insubordination in refusing to answer a relevant inquiry, and the Constitution does not require any hearing on one's reasons for refusal to cooperate with a relevant inquiry. See *Nelson v. County of Los Angeles*, 362 U. S. 1 (1960); *Konigsberg v. State Bar*, 366 U. S. 36 (1961); and *In re Anastaplo*, 366 U. S. 82 (1961). *Slochower v. Board of Education*, 350 U. S. 551 (1956) may be distinguished, since in that case the Court found no necessary connection between Slochower's refusal to answer questions concerning activities twelve years before, put to him not by a school board but by a congressional committee, and his unfitness for service in the New York schools. Here Starbuck refused to answer a question put to him by school authorities concerning whether or not he presently advocated the violent overthrow of government.

Plaintiffs also assert that the provisions of Section 3022 of the Education Law and Section 105(1) of the Civil Service Law which make membership in the Communist Party *prima facie* evidence of disqualification for employment by the state are contrary to procedural due process. The same argument was before the Supreme Court in *Adler*, and the Court decisively rejected it:

> "Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of gov-

ernment by unlawful means. We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support. Nor is there here a problem of procedural due process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has a full opportunity to rebut it * * *. Where, as here, the relation between the fact found and the presumption is clear and direct and is not conclusive, the requirements of due process are satisfied."

342 U. S. 485, 494-96 (1952).

In support of its position, the Court looked to the interpretation of the statute by the New York courts below. *Lederman v. Board of Education,* 276 App. Div. 527, 530, 96 N. Y. S. 2d 466, 470 (2d Dept. 1950), *aff'd sub nom. Thompson v. Wallin, supra,* 806, 815 (1950). The courts of New York not having changed their interpretation of the presumption contained in these statutes, see *Hughes v. Board of Higher Education,* 309 N. Y. 319, 130 N. E. 2d 638 (1955), there is no reason to hold the presumption violative of due process today.

*2. "Vagueness"*

The plaintiffs maintain that breadth of language renders the statutes under attack unconstitutional, because it tends to deter legitimate expression as well as expression which the State is justified in regulating. It is, of course, true that strict standards of draftsmanship are to be applied to a statute having a potentially inhibiting effect on speech; "a man may be the less required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith v. California,* 361 U. S. 147, 151 (1959). However, we must examine the present statutory complex, as implemented by the Regents' regulations and as inter-

preted by the New York courts, to see whether it has a tendency to deter legitimate discussion and activities as well as to carry out the permissible objective of preventing the advocacy of violent overthrow of government.

Subsection 2 of Section 3022 of the Education Law provides that the Board of Regents shall list organizations found to "advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or political subdivision thereof shall be overthrown * * * by force" or found to "advocate, advise, teach, or embrace the duty, necessity, or propriety of adopting any such doctrine * * *." Section 105(1) of the Civil Service Law lists three causes for ineligibility for employment in the state civil service; wilfully advocating, advising, or teaching the doctrine of violent overthrow of government; publishing, editing, or selling any printed matter containing such a doctrine, while advocating the necessity or propriety of adopting the doctrine; and organizing or becoming a member of a group of persons advocating such a doctrine.

Legitimate activities are not deterred by these sections of the statutes. Not teaching Communist theory in a course in economic or political history; only teaching that government shall or should "be overthrown * * * by force" is a basis for adverse consequences under these sections. Not innocent membership in the Communist Party, in contrast to what could have been deterred by the oath struck down in *Weiman v. Updegraff*, 344 U. S. 183 (1952); only knowing membership in an organization advocating the violent overthrow of government is grounds for ineligibility for state employment. *Lederman v. Board of Education*, 276 App. Div. 527, 530, 96 N. Y. S. 2d 466, 470 (2d Dept. 1950), *aff'd sub nom. Thompson v. Wallin*, 301 N. Y. 476, 95 N. E. 2d 806 (1950), *aff'd sub*

*nom. Adler v. Board of Education*, 342 U. S. 485 (1952); see also *Adler v. Wilson*, 282 App. Div. 418, 123 N. Y. S. 2d 655 (3d Dept. 1953).

Nor do these sections deter all distribution of Communist propaganda, or the editing of Communist literature. Under Section 105(1)(b), a distributor or editor of subversive literature must also advocate or embrace the "duty, necessity, or propriety" of adopting the doctrine of violent overthrow, before he can be disqualified from state employment. Finally, the sections just described do not deter representing the Communist Party in a lawsuit, or defending the constitutional rights of the Communist Party in a newspaper article, or voting for a candidate also supported by the Communist Party—the legitimate activities which the Supreme Court feared might be deterred by the broad oaths struck down in *Cramp v. Board of Public Instruction*, 368 U. S. 278 (1961) (state employees had to swear that they had never lent their "aid, support, advice, counsel, or influence to the Communist Party") and in *Baggett v. Bullitt*, 377 U. S. 360 (1964) (state teachers had to swear, among other things, that they did not aid any person to aid in the commission of any act intended to alter the constitutional form of government by force or violence).

The Supreme Court in *Baggett* made clear that narrowly drawn statutes aimed wholly at the control of subversive activities would be upheld as constitutional. The Court distinguished the broad oath before it in *Baggett* from the oath upheld in *Gerende v. Board of Supervisors*, 341 U. S. 56 (1951), on the grounds that the *Gerende* oath required a candidate for state office to swear only that he is not engaged "in one way or another in the attempt to overthrow the government by force or violence," and that he is not knowingly a member of an organization engaged in such an

attempt. The sections of the New York statutes just analyzed proscribe no more than the oath upheld in *Gerende*, and seem less questionable even than *Gerende* since they place the burden of taking the first step and the burden of proof on the official challenging eligibility. The Supreme Court upheld these sections, 3022 of the Education Law and 105(1) and (2) of the Civil Service Law (the last two subsections then being known as 12(a) of the Civil Service Law), in *Adler v. Board of Education*, 342 U. S. 485 (1952), although the sections were attacked on grounds of vagueness at that time. We see no reason to change the result of that case.

The remaining sections of the statutes under attack seem at first glance more general. Section 3021 of the Education Law provides for the removal of school employees "for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts" while employed in the school system. Section 105(3) of the Civil Service Law provides for the removal of civil servants from office for "treasonable or seditious" words or acts.

However, the 1958 amendments to section 105(3) greatly restricted the scope of that subsection. N. Y. Sess. Laws 1958, ch. 790, sec. 105. "Treasonable words or acts", for the purpose of 105(3), now must come within the definition of "treason" in Section 2380 of the Penal Law:

> "1. Leving war against the people of the state within this state; or, 2. A combination of two or more persons by force to usurp the government of the state or to overturn the same, shown by a forcible attempt, made within the state, to accomplish that purpose; or, 3. Adhering to the enemies of the state, while separately engaged in war with a foreign enemy, in a case prescribed by the constitution of the United States, as giving to such enemies aid and comfort within the state or elsewhere."

We do not understand the plaintiffs to challenge this definition of treason on grounds of vagueness; it is as good as can be done, and resembles the definition used in Article III, section 3, of the Federal Constitution. Even the third clause of the New York definition is narrow, having been construed to apply only in wars against foreign enemies waged by the State of New York separately from the United States. *People v. Lynch,* 11 Johns, R. 549 (1814).

Similarly, "seditious acts and utterances", for the purpose of section 105(3), now must come within the definition of "criminal anarchy" in section 160 of the Penal Law:

> "the doctrine that organized government should be overthrown by force or violence or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means."

This is a definition closely connected with the state's legitimate interest in self-preservation, and as such is within the realm of the constitutional under *Gerende, Cramp,* and *Baggett.* We note in passing that the 1958 amendment to section 105(3) refers to section 160 of the Penal Law, entitled "Criminal anarchy defined". The looser language of section 161 of the Penal Law, entitled "advocacy of criminal anarchy", is not now before us, although the plaintiffs seem to wish that it were.

The 1958 amendments of section 105(3) did not, by their terms, extend to the parallel language of section 3021. But the history of the two sections—born as successive sections of an act of 1917, N. Y. Sess. Laws 1917, ch. 416, secs. 2 and 3—together with the identity of language in the two sections, indicates that the two must be construed *in pari materia.* The presumption that statutes "will be construed in such a way as to avoid the constitutional question presented", *Baggett v. Bullitt,* 377 U. S. 360, 375 (1964), reinforces us in the conclusion that the words

"seditious or treasonable acts or words" in section 3021, like their identical twins in section 105(3), must be defined by reference to sections 2380 and 160 of the Penal Law. When this is done, sections 3021 and 105(3)—like the separable but related Sections 3022 and 105(1) and (2)—become sharply defined, and can withstand any possible attack on grounds of vagueness.

*III. Conclusion*

We find constitutional section 105 of the Civil Service Law, Sections 3021 and 3022 of the Education Law, Section 244 of Article XVIII of the Rules of the Board of Regents, and the procedures under these statutes and rules now in effect at the State University of New York at Buffalo. We accordingly give judgment for the defendants, and deny the plaintiffs all the relief requested by them.

/s/ LEONARD P. MOORE,
*U. S. C. J.,*

/s/ HAROLD P. BURKE,
*U. S. P., U. S. D. C.,*

/s/ JOHN O. HENDERSON,
*U. S. D. J.*

January 5th, 1966.

**Decision and Order**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civil 10994

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD, and GEORGE E. STARBUCK,

*Plaintiffs,*

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

*Defendants.*

LIPTSITZ, GREEN AND FAHRINGER,
(RICHARD LIPSITZ, of counsel),
Buffalo, New York,
*Attorneys for Plaintiffs.*

JOHN C. CRARY, JR.,
Albany, New York,
*Attorney for Defendants, Board of Trustees of the State University of New York; State University of New York at Buffalo; Clifford C. Furnas, and J. Lawrence Murray.*

LOUIS J. LEFKOWITZ,
Attorney General of the State
of New York,
(RUTH KESSLER TOCH, of Counsel),
*Attorney for remaining Defendants.*

The plaintiffs, employees or former employees of the State University of New York at Buffalo, move for an order convening a three judge court pursuant to Title 28 U. S. C. § 2281.

Essentially, plaintiffs seek to have sections 3021 and 3022 of the New York Education Law, section 105 of the New York Civil Service Law, section 244, article XVIII of the Rules of the Board of Regents of the State of New York, and certain other certificates, oaths and questionnaires promulgated under the authority of the aforementioned statutes, declared unconstitutional and of no force and effect. Unless no substantial federal question is presented, a three judge court must be convened.

As was stated by the Supreme Court in *California Water Service Co. v. City of Redding*, 304 U. S. 252, 255 (1938):

> "[t]he lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this [Supreme] Court as to foreclose the subject."

In large part the issues raised by the plaintiffs' complaint were laid to rest by the Supreme Court's decision in *Adler v. Board of Education*, 342 U. S. 485 (1952). Viewing New York's clarification of section 3021 and the safeguards of individual rights found in New York's statutory scheme in light of the Supreme Court's decisions in *Garner v. Los Angeles Board*, 341 U. S. 716 (1951); *Adler v. Board of Education, supra; Beilan v. Board of Education*, 357 U. S. 399 (1958); *Lerner v. Casey*, 357 U. S. 468 (1958); *Nelson v. Los Angeles County*, 362 U. S. 1 (1960); *Konigsberg v. State Bar*, 366 U. S. 36 (1961); *In re Anastaplo*, 366 U. S. 82 (1961); *Cramp v. Board of Public Instruction*, 368 N. S. 278 (1961); and *Baggett v. Bullitt*, 377 U. S. 360 (1964), the court finds no substantial federal question

raised by the remainder of the plaintiffs' complaint. Accordingly, plaintiffs' motion is denied and plaintiffs' complaint is dismissed. So ordered.

JOHN O. HENDERSON,
*United States District Judge.*

Dated: September 2, 1964.

Opinion

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD and GEORGE E. STARBUCK,

*Appellants,*

v.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

*Appellees.*

No. 359, Docket 29287.

Argued March 8, 1965.

Decided May 3, 1965.

Richard Lipsitz, Buffalo, N. Y. (Lipsitz, Green & Fahringer, Buffalo, N. Y., on the brief), for appellants.

Ruth Kessler Toch, Asst. Sol. Gen. (Louis J. Lefkowitz, Atty. Gen. of New York, on the brief; Paxton Blair, Sol. Gen., of counsel), for Board of Regents, Arthur Levitt, Department of Civil Service, Civil Service Commission, Mary Goode Krone and Alexander A. Falk, appellees.

John C. Crary, Jr., State University Counsel, Albany, N. Y. (Richard A. Foster and David L. Segel, Albany, N. Y., of counsel) for Board of Trustees of State University of New York, State University of New York at Buffalo, Clifford C. Furnas and J. Lawrence Murray, appellees.

Magavern, Magavern, Lowe & Beilewech, Buffalo, N. Y., submitted brief, *amici curiae* on behalf of American Ass'n of University Professors and American Civil Liberties Union (James L. Magavern, Buffalo, N. Y., Bernard E. Harvith, New York City, Herman I. Orentlicher, Kitty Blair Frank, Washington, D. C., and Melvin L. Wulf, New York City, of counsel).

Before SMITH and MARSHALL, Circuit Judges, and METZNER, District Judge.*

MARSHALL, Circuit Judge:

Appellants, faculty members of the State University of New York at Buffalo, commenced a class action in the United States District Court for the Western District of New York under 28 U. S. C. A. §§ 2281, 2284 for the convening of a three-judge district court to pass on the constitutionality of Sections 3021 and 3022 of the New York Education Law, McKinney's Consol. Laws, c. 16, Section 105 of the New York Civil Service Law, McKinney's Consol. Laws, c. 7, and Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York as well as the required certificates and oaths.

* Sitting by designation.

Appellants refused to sign loyality certificates[1] prepared by the Board of Regents pursuant to Section 3022.[2] The

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[1] "STATE UNIVERSITY OF NEW YORK AT BUFFALO

"CERTIFICATE

"Anyone who is a member of the Communist Party or of any organization advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University.

"Anyone who was previously a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

* * *

"This is to certify that I have read the publication of the University of the State of New York, 1959, entitled 'Regents Rule of Subversive Activities' together with the instructions set forth above and understand that these rules and regulations as well as the laws cited therein are part of the terms of my employment. I further certify that I am not now a member of the Communist Party and that if I have ever been a member of the Communist Party I have communicated that fact to the President of the State University of New York.

..... Date .....Signature"

"CERTIFICATE

"Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University.

"Anyone who was previously a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

---

"This is to certify that I have read the publication of the University of the State of New York, 1959, entitled 'Regents Rules on Subversive Activities' together with the instructions set forth above and understand that these rules and regulations as presented to me, as well as the laws cited therein, except for the Education Commissioner's memorandum, are part of the terms of my employment. I further certify that I am not now a member of the Communist Party of the State of New York or of the United States, and that if I have ever been a member of the Communist Party of the State of New York or of the United States, I have communicated that fact to the President of the State University of New York.

..... Date .....Signature"

[2] "§ 3022. Elimination of subversive persons from the public school system

"1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any college or other institution of higher education owned

(Footnote continued on following page)

complaint is an attack upon the constitutionality of the entire system set up pursuant to the statute requiring the promulgation of the rules and the reference to the statutes in the certificates in question. The claim is that the laws are unconstitutionally vague in violation of the Fourteenth Amendment and that they inhibit vital thought and speech in violation of the First Amendment as made applicable to the states by the Fourteenth Amendment.

[1] Judge Henderson, finding no substantial federal question presented, refused to convene a three-judge court and dismissed the complaint (233 F. Supp. 752). Judge Henderson was correct in his general statement of the law: "Unless no substantial federal question is presented, a three judge Court must be convened." Idlewild Liquor

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(Footnote continued from preceding page)

and operated by the state or any subdivision thereof who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a [now section 105] of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

"2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a [now section 105] of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authorty authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the publice schools of the state.

"3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state."

Corp. v. Epstein, 370 U. S. 713, 715, 82 S. Ct. 1294, 8 L. Ed. 2d 794 (1962). It is likewise true that "the lack of substantiality in a federal question" may appear from previous decisions of the Supreme Court, California Water Serv. Co. v. City of Redding, 304 U. S. 252, 255, 58 S. Ct. 865, 867, 82 L. Ed. 1323 (1938). However, we are not convinced that the issues raised here were determined in Adler v. Board of Education, 342 U. S. 485, 72 S. Ct. 380, 96 L. Ed. 517 (1952). We, therefore, reverse and remand with instructions to convene a three-judge court.

While Adler held Section 3022 not to be unconstitutional as applied to teachers in the public schools of New York, it specifically refused to pass upon the constitutionality of section 3021 (342 U. S. at 489, 496, 72 S. Ct. 380) and certainly did not consider the application of section 3022 to university faculty members. The certificate here in question and several statutory amendments, such as Section 105(3) of the Civil Service Law, are all subsequent to Adler. Moreover, there is a significant similarity between the state laws in question here and those held unconstitutional in Baggett v. Bullitt, 377 U. S. 360, 84 S. Ct. 1316, 12 L. Ed. 377 (1964). *Cf.* also Dombrowski v. Pfister, 85 S. Ct. 1116 (April 26, 1965).

[2] Appellees rely heavily upon the statement in Adler that, "It is equally clear that they [public school teachers] have no right to work for the State in the school system on their own terms," 342 U. S. 492, 72 S. Ct. 384. However, the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. In less than a year after Adler the Supreme Court clearly limited its language in Adler:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the

> public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." Wieman v. Updegraff, 344 U. S. 183, 192, 73 S. Ct. 215, 219, 97 L. Ed. 216 (1952).

See also, Baggett v. Bullitt, 377 U. S. 360, 34 S. Ct. 1316 (1964); Torcaso v. Watkins, 367 U. S. 488, 81 S. Ct. 1688, 6 L. Ed. 2d 982 (1961); Cramp v. Board of Public Instruction, 368 U. S. 278, 288, 82 S. Ct. 275, 7 L. Ed. 2d 285 (1961); Shelton v. Tucker, 364 U. S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960); Slochower v. Board of Higher Education, 350 U. S. 551, 76 S. Ct. 637, 100 L. Ed. 692 (1956); Willcox, Invasions of the First Amendment Through Conditioned Public Spending, 11Cornell L. Q. 12 (1955).

In Wieman the Court "noted probable jurisdiction because of the public importance of this type of legislation and the recurring serious constitutional questions which it presents." 344 U. S. at 186, 73 S. Ct. at 216, and as late as 1964 the Court repeated the identical statement in Baggett, *supra*, 377 U. S. at 366, 84 S. Ct. at 1319. This case no less should not be dismissed as lacking in substance. We, therefore, reverse the judgment below and remand with instructions to the District Court to convene a three-judge district court pursuant to 28 U. S. C. A. § 2284.

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**Statutes and Administrative Rules Involved**

SUBDIVISION 1 of SECTION 105, NEW YORK CIVIL SERVICE LAW, is captioned, "Ineligibility of persons advocating overthrow of government by force or unlawful means," and provides:

> "No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as

superintendent, principal or teacher in a public school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States, or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(b) prints, publishes, edits, issues or sells any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

(c) organizes or helps to organize or become a member of any society or group of persons which teaches or advocates that the government of the United States or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

For the purposes of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof."

Subdivision 2 of Section 105, New York Civil Service Law, is captioned, "A person dismissed or declared ineligible pursuant to this section may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the Supreme Court, why a hearing on such charges should not be had," and provides:

"Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and if the final determination shall be in his favor he shall be restored to his position with pay for the period of such suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

SUBDIVISION 3 of SECTION 105, NEW YORK CIVIL SERVICE LAW, is captioned, "Removal for treasonable and seditious acts or utterances," and provides:

"A person in the civil service of the state or of any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean 'treason', as defined in the penal law; a seditious word or act shall mean 'criminal anarchy' as defined in the penal law."

SECTION 3021, NEW YORK EDUCATION LAW, is captioned, "Removal of superintendents, teachers, and employees for treasonable or seditious acts or utterances," and provides:

"A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position."

SECTION 3022, NEW YORK EDUCATION LAW, is captioned, "Elimination of subversive persons from the public school system," and provides:

"1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualifica-

tion for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state."

ARTICLE XVIII, SECTION 244, RULES OF THE BOARD OF REGENTS (Adopted July 15, 1949), is captioned, "Subversive Activities", and provides:

"1. The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employes who violate the provisions of section 3021 of the Education Law or section 12-a* of the Civil Service Law.

a. Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities, shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

b. The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than Sep-

* Now section 105.

tember 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

c. The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision b of this paragraph.

d. The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision b of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justifies such action, or to reject the recommendations for such action.

e. Following the determination required in subdivision d of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

2. Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a* of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

3. On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by their presiding officer, of the measures taken by them for the enforcement of these regulations during the calendar year ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or the officials designated by them have recommended that action be taken to dismiss the employes

* Now section 105

in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also include, for the group listed under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

4. Immediately upon the finding by school authorities that any person is disqualified for appointment or retention in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted."

SECTIONS 160 and 161 of the NEW YORK PENAL LAW provides:

"SECTION 160. Criminal anarchy defined.

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony."

"SECTION 161. Advocacy of criminal anarchy.

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or for any civilized nation having an organized government, because of his official character, or any other crime, without intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such a doctrine

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both."

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## Feinberg Certificates

### A.

Sitting by designation.

1. STATE UNIVERSITY OF NEW YORK AT BUFFALO

"CERTIFICATE

"Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University.

"Anyone who was previously a member of the Communist Party or of any organization that advocates the

violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

* * *

"This is to certify that I have read the publication of the University of the State of New York, 1959, entitled 'Regents Rule on Subversive Activities' together with the instructions set forth above and understand that these rules and regulations as well as the laws cited therein are part of the terms of my employment. I further certify that I am not now a member of the Communist Party and that if I have ever been a member of the Communist Party I have communicated that fact to the President of the State University of New York.

..... Date ..... Signature"

B. "CERTIFICATE

"Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof can not be employed by the State University.

"Anyone who was previously a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

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"This is to certify that I have read the publication of the University of the State of New York, 1959, entitled 'Regents Rules on Subversive Activities' together with the instructions set forth above and understand that these rules and regulations as presented to me, as well as the laws cited therein, except for the Education Commissioner's memorandum are part of the terms of my employment. I further certify that I am not now a member of the Communist Party of the

State of New York or of the United States, and that if I have ever been a member of the Communist Party of the State of New York or of the United States, I have communicated that fact to the President of the State University of New York.

..... Date ..... Signature"

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**Resolutions of the Board of Trustees of the State University of New York**

EXHIBIT

*Resolved* that Resolution 65-100 adopted May 13, 1965, be and the same hereby is, amended to read as follows:

*Resolved* that Resolution No. 56-98 adopted on October 11, 1956, incorporated into the Policies of the Board of Trustees as Section 3 of Title B of Article XI thereof, and the Procedure on New Academic Appointments therein referred to, be, and the same hereby are, *Rescinded,* and

*Further Resolved* that Title B of Article XI of the Policies of the Board of Trustees be amended by adding a new Section 3 thereto to read as follows:

§ 3. Procedure for appointments.

Before any initial appointment shall hereafter be made to any position certified to be in the professional service of the University pursuant to Section 35 of the Civil Service Law the officer authorized to make such appointment or to make the initial recommendation therefor shall send or give to the prospective appointee a statement prepared by the President concisely explaining the disqualification imposed by Section 105 of

the Civil Service Law and by Section 3022 of the Education Law and the Rules of the Board of Regents thereunder, including the presumption of such disqualification by reason of membership in organizations listed by the Board of Regents. Such officer, in addition to due inquiry as to the candidate's record, professional training, experience and personal qualities, shall make or cause to be made such further inquiry as may be needed to satisfy him as to whether or not such candidate is disqualified under the provisions of such statute and rules. Should any question arise in the course of such inquiry such candidate may request or such officer may require a personal interview. Refusal of a candidate to answer any question relevant to such inquiry by such officer shall be sufficient ground to refuse to make or recommend appointment. An appointment or recommendation for appointment shall constitute a certification by the appointing or recommending officer that due inquiry has been made and that he finds no reason to believe that the candidate is disqualified for the appointment.

***Further Resolved*** that this resolution shall become effective July 1, 1965, provided, however, that this resolution shall become effective immediately with respect to appointments made or recommended prior to July 1, 1965 to take effect on or after that date.

**Laws of 1958, Chapter 503**

Section 1. Declaration of legislative intent. The legislature takes cognizance that section three thousand twenty-two of the education law makes provision for the implementation and enforcement of section twelve-a of the civil service law with respect to the elimination of subversive persons from the public school system; that such section three thousand twenty-two authorizes the board of regents, after notice and hearing, to list "organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law"; that the board of regents, after notice and hearing, has so listed the communist party of the United States of America and the communist party of the State of New York; and that pursuant to such section three thousand twenty-two and rules and regulations adopted thereunder membership in either such organization constitutes *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state. It is the intent of the legislature to apply to all officers and employees subject to section twelve-a of the civil service law the same provision that membership in either of such organizations shall constitute *prima facie* evidence of disqualification for appointment or continued employment.